

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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LEE HUTSON, individually and d/b/a  
SILENT GIANT PUBLISHING COMPANY,

Plaintiff,

v.

NOTORIOUS B.I.G. LLC, OSTEN HARVEY,  
JR. p/k/a EASY MO BEE, JANICE COMBS  
PUBLISHING, INC. d/b/a JUSTIN COMBS  
PUBLISHING, BIG POPPA MUSIC, EMI  
APRIL MUSIC INC., BAD BOY  
ENTERTAINMENT, INC., individually and  
d/b/a/ BAD BOY RECORDS, WARNER  
MUSIC GROUP CORP., UMG  
RECORDINGS, INC.

Defendants.

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Civil Action No. 1:14-cv-02307-RJS

ECF CASE

**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

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This memorandum of law is respectfully submitted on behalf of Defendants Notorious B.I.G. LLC (“BIG”), Janice Combs Publishing, Inc. d/b/a Justin Combs Publishing (“Combs Publishing”), Big Poppa Music (“Poppa”), EMI April Music Inc. (“EMI”), Bad Boy Entertainment, Inc., individually and d/b/a Bad Boy Records (“Bad Boy”), and Warner Music Group Corp. (“WMG”) (collectively, “Defendants”), in support of their motion for an order under Fed. R. Civ. P. 12(b)(6) dismissing Counts 1, 2 and 3 of the Complaint for the following: (i) failure to properly plead any copyright infringement claim, (ii) under the “ordinary observer” test because the works at issue are not substantially similar, and (iii) based on the three-year copyright statute of limitations. Defendants also seek an order under Rule 12(b)(6) dismissing Counts 4, 5 and 6 of the Complaint because they do not allege causes of action, but, instead, remedies only.

#### **PRELIMINARY STATEMENT**

Mr. Hutson has filed a First Amended Complaint (“FAC”) that is an attack against imaginary enemies. He once again challenges Defendants’ ownership of the 1973 song “*Can’t Say Enough About Mom*” (“*Can’t Say Enough*”). This is not the first of such challenges. This is not the first of such challenges. Rather, it is another in a long line of baseless allegations that began years ago with claims against Curtom Records, followed by claims against WMG, and then against Bad Boy and BIG. These futile claims now underlie this lawsuit against nine different defendants.

Despite knowing that he owns nothing, every few years Mr. Hutson somehow recruits another lawyer to advocate on his behalf about matters long ago resolved. This time, Mr. Hutson appears to believe that “*The What*”, a song written and performed by Christopher Wallace (“Mr. Wallace”) infringes on an interest he allegedly owns in *Can’t Say Enough*.



*The What* is comprised of two separate copyrights – a sound recording and a musical composition. The sound recording is owned by WMG. WMG also controls distribution of the composition through a license from BIG, Poppa, and Combs Publishing, for whom EMI is an administrator (collectively, “Related Warner Parties”).

Even though Defendants notified Mr. Hutson’s counsel of the multiple deficiencies in his initial Complaint in this matter, the FAC remains defective and it must be dismissed for at least these of the foregoing reasons:

First, the FAC should be dismissed because Mr. Hutson does not own an interest in *Can’t Say Enough*. Defendant WMG owns 100% of the sound recording (“Master Recording”) and at least 50% of the musical composition (“Composition”) of *Can’t Say Enough*. Based on the allegations in the FAC, Silent Giant Inc., an Illinois corporation which is not a party to this action, owns the remaining 50% of the Composition. Mr. Hutson cannot allege any copyright infringement claim against WMG and Bad Boy as they own *Can’t Say Enough*. As to defendants BIG, Combs Publishing, Poppa and EMI (collectively “Related Warner Parties”), their use of *Can’t Say Enough*, if any, was with WMG’s permission.

Second, the FAC should be dismissed because Mr. Hutson failed to plead substantial similarity. Indeed, the words “substantial similarity” do not even appear in the FAC. The FAC merely alleges that “portions” of *Can’t Say Enough* were allegedly used in *The What*. Glaringly, the FAC fails to specify what protectable portions of *The What* are allegedly substantially similar to *Can’t Say Enough*, as well as how such portions were allegedly utilized.

Third, as a matter of law, Plaintiff lacks a viable claim for copyright infringement against Defendants because the sole common element between the two works the use of a single guitar

chord, channeled through a guitar pedal, commonly known as a “wah-wah” pedal - is not copyrightable.

Fourth, simply listening to the songs as “an ordinary observer” – which this Court may do in a Rule 12(b)(6) motion – demonstrates that *Can’t Say Enough* and *The What* are not substantially similar. The songs are different, and share no musical, structural, rhythmic or thematic similarities. An average lay observer would not recognize or conclude that *The What* was taken from the *Can’t Say Enough*.

Fifth, if the Court determines Mr. Hutson’s infringement claim is properly pled, and believes an “ordinary observer” would find the songs substantially similar, the copyright infringement claims still must be dismissed. As stated above, WMG (and Bad Boy therein) own both the Master Recording and the Composition. Any use by the Licensees was with WMG’s permission; thus, as the Licensees are licensees of WMG, Mr. Hutson cannot maintain an infringement action against them.

Sixth, if Plaintiff’s copyright infringement claim proceeds against any of the Defendants, it is partially barred by the Copyright Act’s three-year statute of limitations. Plaintiff concedes *The What* was released on or about September 13, 1994. Plaintiff filed his original complaint on April 2, 2014. Therefore, the infringement claim must be dismissed to the extent Mr. Hutson seeks to recover any damages or profits for alleged acts of infringement occurring before April 2, 2011.

Seventh, Counts 4 (Injunctive Relief), 5 (Prejudgment Interest), and 6 (Attorney’s Fees) of the FAC should be dismissed because they allege remedies, not causes of action.

## BACKGROUND

### A. The Chain Of Title Regarding The Rights To *Can't Say Enough*

On September 11, 1970, Aopa Publishing Co. (“Aopa Inc.”) was incorporated in the State of Tennessee.<sup>1</sup> Declaration of Ernest Badway (“Badway Decl.”), ¶ 5, Ex. 4. On March 3, 1972, Silent Giant Publishing Co. (“SG Inc.”) was incorporated in the State of Illinois.<sup>2</sup> Badway Decl., ¶ 6, Ex. 5.

On March 27, 1972, less than a month after SG Inc.’s incorporation, Plaintiff Lee Hutson (“Mr. Hutson”) entered into an “Exclusive Composer Agreement” with Aopa Inc. and SG Inc., under which Mr. Hutson agreed that any works created by him as a songwriter would be owned, “in any and all forms,” by SG Inc. and Aopa Inc. (“Composer Agreement”). Badway Decl., ¶ 7, Ex. 6.

On September 7, 1972, Mr. Hutson signed a “work-for-hire” recording contract with Curtom Record Company, Inc. (“Curtom”), under which Mr. Hutson agreed to create master recordings which were to be owned by Curtom (“Recording Agreement”). Badway Decl., ¶ 8, Ex. 7; FAC, D.I. 19 at ¶ 16.

On November 30, 1973, while Mr. Hutson was bound by both the Composer Agreement and the Recording Agreement, Curtom released Mr. Hutson’s second studio album, entitled “*The Man!*” FAC, D.I. 19 at ¶ 14. The sound recording of *Can't Say Enough* is the first track that

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<sup>1</sup> This and other documents reference sin this Motion to Dismiss may considered by the Court under Rule 12(b)(6). The Court may consider the complaint, documents attached to the complaint, matters of public record, and documents which, while not attached to the complaint, are integral to the complaint’s allegations. *Faulkner v. Arista Records LLC*, 602 F. Supp. 2d 470, 477 (S.D.N.Y. 2009); *see also Bldg. Indus. Elec. Contractors Ass’n v. City of New York*, 678 F. 3d 184, 187 (2d Cir. 2012).

<sup>2</sup> Notably, and without substantiating his assertion, Mr. Hutson currently claims Silent Giant Publishing Company is his d/b/a, rather than a corporation.

appears on “*The Man!*” Thus, when they were created, Mr. Hutson did not personally own the rights to either the composition (“Composition”) or sound recording (“Master Recording”) of *Can’t Say Enough*. FAC, D.I. 19 at ¶ 14.

A copyright application for the Master Recording was registered in 1973 by Aopa Inc., U.S. Copyright Office Registration No. N0000001491. FAC, D.I. 19 at ¶ 16. A copyright application for the Composition was registered in 1973 by Aopa Inc. and SG., Inc., U.S. Copyright Office Registration No. EU457200. Badway Decl., ¶ 9, Ex. 8; FAC, D.I. 19 at ¶ 14.

**1. WMG’s Ownership of The Master Recording**

Since November 22, 1974, Warner Brothers Records, Inc., (“Warner Records”) and its ultimate parent company, Warner Music Group Corp. (“WMG”), are the exclusive owner of *all* rights, including domestic and international copyrights, to the Master Recording of *Can’t Say Enough*.

On or about November 22, 1974, Curtom entered into a contract with Warner Records under which Curtom sold and transferred to Warner Records “all right, title, and interest of whatsoever kind or nature in and to,” among other works, the Master Recording of *Can’t Say Enough*, “and all copies and derivatives thereof, perpetually and throughout the universe,” including “exclusive and perpetual ownership” of the Master Recording; the right to “sell, lease, license, or otherwise exploit” the Master Recording; and the right to “publically perform” the Master Recording by “radio, motion picture, television or any other method or device now or hereafter known” (“Master Recording Sale Agreement”). Badway Decl., ¶ 10, Ex. 9.

**2. WMG’s Ownership of The Composition**

Since January 1, 2001, WB Music Corp. and Warner-Tamerlane Publishing Corp (collectively, “Warner Publishing”) and its ultimate parent company, Warner Music Group Corp.

(“WMG”), are the exclusive owner of at least 50% of the rights, title and interest, including domestic and international copyrights, to the Composition of *Can’t Say Enough*.

On March 22, 2001, the Mayfield Family Trust (the successor-in-interest to Aopa Inc.) entered into contract with Warner Publishing, under which the Mayfield Family Trust agreed to “sell, assign, and transfer” to Warner Music “100% of [Aopa Inc.]’s undivided co-publisher’s interest (including but not limited to all copyrights, renewal copyrights, [and] extensions of copyrights),” domestic and international, in regards to the Composition of *Can’t Say Enough* (“Composition Sale Agreement”). Badway Decl., ¶ 11, Ex. 10. Upon being signed, the Composition Sale Agreement was given a retroactive effect to January 1, 2001.

**B. Hutson’s Prior CDCA Litigation Against Warner and Rhino**

On October 22, 2007, Mr. Hutson filed suit in the Central District of California against Rhino Entertainment Co. (“Rhino”) and Warner Records, in an action entitled *Hutson v. Rhino Entm’t Co., et.al.*, Case No. VC07-07024-GAF-PLA (the “CDCA Litigation”). FAC, D.I. 19 at ¶ 22. The ultimate parent company of Rhino – just as with Warner Records and Warner Publishing – is WMG. *Id.* (Hereinafter, Rhino, Warner Records, Warner Publishing and WMG shall be collectively referred to as the “Warner Parties”.)

The sole issue in the CDCA Litigation was whether the Warner Parties owned the North American rights of the Master Recording of *Can’t Say Enough*. FAC, D.I. 19 at ¶ 22; Ex. 1 to FAC. Mr. Hutson did not question or challenge the Warner Parties’ ownership of international and other rights to the Master Recording, which were established in 1974.

On December 17, 2008, in a settlement agreement, Mr. Huston affirmed and acknowledged the Warner Parties’ ownership of the North American rights to the Master Recording of *Can’t Say Enough* (“Settlement Agreement”). *Id.*

**C. The California Litigation**

Even though Mr. Hutson acknowledged the Warner Parties' ownership rights in the Master Recording in 2008, beginning in or around July 2012, and continuing to just prior to the filing of this action, Mr. Hutson sent no less than fifteen (15) demand letters, in which he alleged that Defendant Notorious B.I.G. LLC ("BIG") infringed his rights to the Master Recording of *Can't Say Enough*. FAC, D.I. 19 at ¶¶ 35 & 36. In each instance, BIG responded, by denying Mr. Hutson's accusations and providing support demonstrating the defects in Mr. Hutson's allegations. *Id.* Despite such evidence, Mr. Hutson continued his letter writing campaign; each contained increasing demands.

On March 18, 2014, Mr. Hutson sent BIG's counsel another demand letter, stating that if BIG failed to meet all of his demands by March 28 – including transfer of 50% ownership of the sound recording of *The What* (which WMG owns), as well as a cash payment of no less than \$450,000 – Mr. Hutson would file a lawsuit for copyright infringement in the Southern District of New York. FAC, D.I. 19 at ¶¶ 35 & 36.

The March 28, 2014 deadline came and went with no action filed by Mr. Hutson. *See generally*, D.I. 1 (filed April 2, 2014). Nevertheless, fearing that Mr. Hutson's extended and baseless campaign of unwarranted harassment would continue, BIG filed suit in in the Central District of California on March 31, 2014 ("CA Action").<sup>3</sup> *Id.*

On April 2, 2014, in response to the CA Action, Mr. Hutson filed the instant action (the "SDNY Litigation"). SDNY Litigation, Docket No. 2. After Defendants notified Mr. Hutson of

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<sup>3</sup> On May 8, 2014, Mr. Hutson filed a motion to dismiss in the CA Action for lack of personal jurisdiction. CA Action, Docket No. 16. This Court stayed the SDNY Litigation pending the outcome of Mr. Hutson's motion to dismiss. SDNY Litigation, Docket No. 27. On August 1, 2014, the Court authorized Defendants to pursue this motion. SDNY Litigation, Docket No. 31.

their intention to file a motion to dismiss his complaint, including because he lacked ownership of a valid copyright in the work based on the 2008 settlement agreement, Mr. Hutson acknowledged that WMG owned the Master Recording. FAC, D.I. 19 at ¶ 37. Mr. Hutson's counsel agreed to file an amended pleading addressing Mr. Hutson's lack of ownership.

Nevertheless, on May 15, 2014, Mr. Hutson filed the FAC maintaining his contentions that Defendants infringed both the Master Recording and the Composition. SDNY Litigation, Docket Nos. 11, 19.

Specifically, the FAC contains allegations against all six (6) Defendants, including three counts for copyright infringement as well as three remedies. For the reasons set forth below, Mr. Hutson's FAC should be dismissed *in toto*, with prejudice.

### **LEGAL ARGUMENT**

#### **PLAINTIFF'S CLAIMS AGAINST DEFENDANTS SHOULD BE DISMISSED WITH PREJUDICE**

To survive a motion to dismiss under Rule 12(b)(6), a complaint must include sufficient facts to state a claim to relief that is "plausible" on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679-680 (2009); *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In deciding a Rule 12(b)(6) motion, a court should assume the factual allegations as true but should not assume the truth of legal conclusions.<sup>4</sup> *Iqbal*, 556 U.S. at 679. A party

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<sup>4</sup> But in a copyright infringement case, such generosity is limited "to the extent [the allegations] are consistent with the works themselves." *Allen v. Scholastic Inc.*, 739 F. Supp. 2d 642, 645 n. 1 (S.D.N.Y. 2011) (citing *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.* ("Gaito"),

pleading a claim must provide the grounds for his entitlement to relief, not just “labels and conclusions, and a formulaic recitation [of a claim’s elements],” *Twombly*, 550 U.S. at 545, or “‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (alteration in original).

**POINT I**

**PLAINTIFF FAILS TO STATE A CLAIM FOR COPYRIGHT INFRINGEMENT**

Counts 1, 2, and 3 allegedly plead various copyright infringement claims against all Defendants. As set forth below, all three Counts should be dismissed for failure to state a claim.

**A. Copyright Infringement Pleading Standard**

To maintain a copyright infringement action, a plaintiff must establish “(1) ownership of a valid copyright, and (2) copying of the constituent elements of that work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). Mere allegations of copying alone are insufficient to state a claim because not all copying amounts to copyright infringement. *Id.*

In the context of a copyright action, it is well-settled that a plaintiff must set forth in a non-conclusory fashion: (1) which specific original works are the subject of the copyright claim, (2) that the plaintiff owns the copyrights in those works, (3) that the copyrights have been registered in accordance with the statute, and (4) by what acts and during what time the defendant infringed the copyright.” *Ritani, LLC v. Aghjayan*, 2012 WL 2979058,

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602 F.3d 57, 64 (2d Cir. 2010)). The works at issue “supersede and control contrary descriptions of them, including any contrary allegations, conclusions, or descriptions of the works contained in the pleadings.” *Gaito*, 602 F.3d at 64 (citations omitted).



at \*9 (S.D.N.Y. 2012); *Zalewski v. T.P. Builders, Inc.*, 10 Civ. 876, 2011 WL 3328549, at \*3 (N.D.N.Y. Aug. 2, 2011).

Fed. R. Civ. Proc. 8 also requires that particular copyright infringing acts be set out with some specificity, and that broad, sweeping allegations of infringement are insufficient. *Kuklachev v. Gelfman*, 600 F. Supp. 2d 437, 473 (E.D.N.Y. 1992); *see also Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000) (“Broad, sweeping allegations of infringement do not comply with Rule 8.”). Additionally, “Post-*Iqbal*, the courts in [the Second] Circuit considering motions to dismiss copyright claims have held that a plaintiff with a valid copyright must allege that “(1) defendant has actually copied the plaintiff’s work; and (2) copying is illegal because a substantial similarity exists between the defendant’s work and the protectable elements of plaintiff’s.”” *Ritani*, 2012 WL 2979058 at \*11; *Canal Image UK Ltd. v. Lutvak* (“*Canal Image*”), 773 F. Supp. 2d 419, 428 (S.D.N.Y. 2011).

**B. Plaintiff’s Copyright Claims Fail As He Has Not Properly Pled Copyright Ownership**

To properly bring a claim for copyright infringement, among other elements, a plaintiff must plead facts definitively demonstrating ownership of a valid copyright. *Feist Publ’ns, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991). Mr. Hutson has not, and cannot, plead sufficient facts showing he owns any copyright interest in *Can’t Say Enough*. Thus, the FAC fails to state a claim for copyright infringement and must be dismissed.

Where a recorded song is at issue, there are two possible copyright interests: (1) a copyright in a sound recording (here, the Master Recording) and (2) a copyright in a composition (here, the Composition). As discussed below, Mr. Hutson cannot properly plead ownership of either.

**1. Mr. Hutson Lacks A Copyright Interest In the Master Recording**

As discussed in Section III, *supra*, WMG has owned the worldwide rights to the Master Recording since 1974. The FAC admits that Mr. Hutson has no ownership interest in the Master Recording, stating, “Plaintiff acknowledged that Rhino Entertainment Company own[s] all right, title, and interest to the Master.” FAC, D.I. 19 at ¶ 23, 37 (“Plaintiff acknowledged the Warner Parties’ North American rights in the Master in 2007”).<sup>5</sup> Accordingly, Mr. Hutson cannot state a claim for copyright infringement based on ownership of the Master Recording.

**2. Mr. Hutson Lacks A Copyright Interest In The Composition**

A copyright application for the Composition was registered in 1973 by Aopa Inc. and SG, Inc., Registration No. EU457200. As discussed above, Aopa, Inc. transferred its 50% interest in the composition to the Warner Parties in 2001.

From the face of the copyright registration, SG, Inc., an Illinois corporation, owns the other 50% share of the Composition. SG Inc. is not a party to this action. The FAC is devoid of any allegations demonstrating that Mr. Hutson, as an individual, has an ownership interest in the Composition. While Mr. Hutson alleges that he uses the d/b/a “Silent Giant,” the mere commonality of a name does not transfer ownership from the Illinois entity that holds 50% of the

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<sup>5</sup> Mr. Hutson unsuccessfully tries to create a controversy over the scope of the Warner Parties’ ownership in the FAC, which fails for the following reasons: (1) the Warner Parties’ documents show clear chain of title to the worldwide rights; (2) any dispute regarding non-North American use of the Master is either a state law claim governed by the Settlement Agreement or a non-US copyright claim that falls outside the jurisdiction of this Court. *Subfilms, Ltd. v. MGM-Pathé Communications Co.*, 24 F.3d 1088 (9th Cir. 1994) (“United States copyright laws do not reach acts of infringement that take place entirely abroad.”); Berne Convention (Paris text), art. 5(2) (supporting that a purported copyright holder within the United States must bring suit in the courts of the foreign country where international infringement is claimed, and that the suit must be adjudicated under the foreign jurisdiction’s copyright law: “[The] extent of [copyright] protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”).

Composition to Mr. Hutson. 17 U.S.C. § 204; *see also Jasper v. Bovina Music, Inc.*, 314 F. 3d 42, 46 (declaring that “a valid assignment of a copyright requires a writing signed by the alleged assignor . . .”).

Even if Mr. Hutson claims standing as an assignee – which he has not pled – the FAC *still* fails; an assignee bears the burden of pleading, and ultimately proving, chain of title. *Nimmer on Copyright* § 12.11[C]; *accord Religious Technology Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 923 F. Supp. 1231, 1241 (N.D. Cal. 1995); *accord Kenbrooke Fabrics Inc. v. Soho Fashions, Inc.*, 13 U.S.P.Q. 2d 1472, 1476 (S.D.N.Y. 1989).<sup>6</sup> The FAC lacks any such allegations.

With no ownership claim in the Master Recording or the Composition, all of Mr. Hutson’s claims for copyright infringement – Counts 1 through 3 of the FAC – must be dismissed.

C. **Mr. Hutson’s Copyright Claims Also Fail Because He Has Not Properly Pled Substantial Similarity**

Even if Mr. Hutson’s lack of an ownership interest in the Master Recording or the Composition were not fatal to all of Mr. Hutson’s copyright infringement claims, Counts 1 through 3 must in any event be dismissed because Mr. Hutson failed to allege substantial similarity between the works in question.

To properly plead substantial similarity, a plaintiff must allege that: “(1) the defendant has actually copied the plaintiff’s work; and (2) the copying is illegal because *a substantial*

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<sup>6</sup> Notably, even if Mr. Hutson attempted to file or record an assignment today, he still would have to prove ownership of a valid copyright: Any filing, including an assignment, lacks a presumption of validity if made five years after publication. *Nimmer on Copyright* § 12.11 [C]; *Kenbrooke Fabrics Inc. v. Soho Fashions, Inc.*, 13 U.S.P.Q. 2d 1472, 1476 (S.D.N.Y. 1989).

similarity exists between the defendant's work and the protectable elements of plaintiff's." *Hamil America Inc. v. GFI*, 193 F. 3d 92, 99 (2d Cir. 1999) (internal quotations omitted) (emphasis added); *Poindexter*, 2012 WL 1027639, at \*4. Plaintiff fails to plead either of these required elements, and thus his copyright infringement claims must be dismissed.

**1. Plaintiff Has Failed to Properly Plead Copying**

The FAC fails to properly plead copying. Fed. R. Civ. P. 8 requires that particular infringing acts be set out with some specificity. *Kuklachev*, 600 F. Supp. 2d at 473; *Marvullo*, 105 F. Supp. 2d at 230. Broad, sweeping allegations of infringement are insufficient. *Id.*

Here, the FAC contains a single broad allegation that "'The What' contains a portion of the Master embodying the Composition." FAC, D.I. 19 at ¶ 26. Defendants are not required to guess at what "portion" of the protectable elements of *Can't Say Enough*, if any, are at issue. If a plaintiff fails to allege specific facts, the infringement complaint must be dismissed. *Iqbal*, 556 U.S. at 678 (a party pleading a claim must provide the grounds for his entitlement to relief, not just "labels and conclusions, and a formulaic recitation [of a claim's elements]" *Bell Atlantic Corp. v. Twombly*, 590 U.S. 544, 545 (2007)).

**2. Plaintiff Has Failed to Plead Illegal Copying**

The FAC also must be dismissed because Mr. Hutson failed to properly plead the second prong of the substantial similarity test – namely, that the alleged copying at issue "amounts to an improper or unlawful appropriation by demonstrating that substantial similarities relate to the protectable material." *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139-40 (2d Cir. 1992); *Canal Image*, 773 F. Supp. 2d at 428. Mr. Hudson must identify both the protectable elements within his work and how the similarity between the two works at issue is substantial. *Id.*; *Ritani*, 2012 WL 2979058 at \*11.

Once again, the FAC is defective. It is devoid of any allegations whatsoever that *The What* is similar to *Can't Say Enough*, let alone substantially similar. Nowhere does the FAC attempt to parse out any protectable elements allegedly infringed by *The What*, or does it contain any allegation of how the works are substantially the same. Indeed, the words “substantially similar” are not even *mentioned* in the FAC.

At best, the FAC alleges that a “noted” musicologist “affirms a clear infringement” between the Master Recording and *The What*. FAC, D.I. 19 at ¶ 34. This self-serving, hearsay statement is insufficient to support a claim for copyright infringement for several reasons: (1) as acknowledged in the FAC, Hutson has no ownership in the Master Recording (FAC, D.I. 19 at ¶ 23, 37); and (2) broad, sweeping allegations of infringement are insufficient to support a claim of copyright infringement. FRCP 8; *Iqbal*, 556 U.S. at 663, 678; *Twombly*, 550 U.S. at 545, 557; *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000). Thus, Plaintiff’s claim for copyright infringement fails and must be dismissed.

## POINT II

### SUBSTANTIAL SIMILARITY DOES NOT EXIST AS A MATTER OF LAW

#### A. Governing Standards

##### 1. The Court has the Authority to Dismiss Due to Lack of Substantial Similarity at the Pleading Stage

Even though the FAC fails to plead substantial similarity, the Court still has the discretion to independently evaluate the works at issue to determine whether they are substantially similar as a matter of law. *Gaito*, 602 F.3d at 64 (authorizing a district court to consider the similarity between the works at issue in connection with a motion to dismiss). “If, in making that evaluation, the district court determines that the two works are ‘not substantially similar as a matter of law,’ the district court can properly conclude that the

plaintiff's complaint, together with the works incorporated therein, do not 'plausibly give rise to an entitlement to relief.'" *Id.* (internal citation omitted) (quoting *Kregos v. A.P.*, 3 F.3d 656,664 (2d Cir. 1993), and *Iqbal*, 556 U.S. at 679).

A determination of non-infringement as a matter of law at the pleadings stage is proper "either because the similarity between two works concerns only non-copyrightable elements of the plaintiff's work, or because no reasonable jury, properly instructed, could find that the two works are substantially similar." *Gaito*, 602 F.3d at 63 (quoting *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983)).

As the Second Circuit stated, where "the district court has before it all that is necessary to make a comparison of the works in question" the court may "resolve the question of substantial similarity as a matter of law on a Rule 12(b)(6) motion to dismiss." *Id.* at 65. The court may make the substantial similarity comparison when the works are attached to the pleading, as in *Gaito*, or when they are provided to the court in a motion to dismiss, because the "court has before it all that is necessary in order to make such an evaluation." *Gaito*, 602 F.3d at 64.

"When a court is called upon to consider whether the works are substantially similar, no discovery or fact-finding is typically necessary, because 'what is required is only a visual [or aural] comparison of the works.'" *Id.*, quoting *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 766 (2d Cir. 1991)). Courts in this district routinely consider audio in this context. See *Poindexter*, 2012 WL 1027639, at \*4, n. 5; *Gottwald v. Jones*, 2011 WL 4344038, at \*4; *Pyatt v. Raymond*, 2011 WL 2078531, at \*6 (S.D.N.Y. May 19, 2011).

If a court determines that no reasonable juror could find substantial similarity, or that any similarities only pertain to unprotectable elements, the infringement claim must be dismissed. See *Buckman v. Cliticorp*, 1996 WL 34158, at \*3 (S.D.N.Y. Jan. 30, 1996), citing *Warner*

*Bros., Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 240 (2d Cir. 1983). Indeed, Courts in this circuit routinely dismiss copyright infringement actions for this reason. *Telebrands*, 719 F. Supp. 2d at 296; *See DiTocco v. Riordan*, 496 Fed. App'x 126, 128 (2d Cir. 2012); *Le Book Pub., Inc. v. Black Book Photography, Inc.*, 418 F. Supp. 2d 305, 310 (S.D.N.Y. 2005).

**B. The Ordinary Observer Test**

Substantial similarity can only exist between two works if 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.” *Telebrands Corp. v. Del Labs., Inc.*, 719 F. Supp. 2d 283, 294 (S.D.N.Y. 2010) (quoting *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 111 (2d Cir. 2001)); *see Newton v. Diamond*, 388 F. 3d 1189, 1195-96 (9th Cir. 2004).

Under the “ordinary observer test” the primary inquiry is whether “an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1002 (2d Cir. 1995) (quoting *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 766 (2d Cir. 1991)); *see also Pyatt*, 2011 WL 2078531, at \*4 (explaining that “the Second Circuit has described this ordinary observer test as requiring proof that defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such . . . music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.”) (internal quotations omitted).

The similarity of the works must be “substantial.” *See, e.g., Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 632 (S.D.N.Y. 2008) (dismissing copyright infringement claim when copying was *de minimis*); *Bell v. Blaze Magazine*, No. 99 Civ. 12342 (RCC), 2001 WL 262718, at \*2 (S.D.N.Y. Mar. 16, 2001) (unprotectable ideas inadequate to

support a finding of substantial similarity); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1067 (2d Cir. 1992) (single words, short phrases or unoriginal expression are not copyrightable and are insufficient to establish infringement).

Here, Plaintiff's copyright claims fail because the works at issue are not similarly, let alone substantially similar.

**C. The Works at Issue Are Not Substantially Similar**

When listening to *Can't Say Enough* and *The What* (collectively, "the Songs"), even the undiscerning ear of the ordinary observer (the lay listener) can identify the multiple and substantial musical and sonic differences between them without difficulty. Indeed, whether compared by genre, musical structure, lyrics, or subject matter – among many other characteristics, elements, and qualities – no similarities exist between the Songs.

**1. The Songs Are Written And Recorded In Different Genres**

*Can't Say Enough* is a lush, wide-ranging, high-fidelity orchestral recording that incorporates soul, R&B, and funk influences. *Badway Decl.*, ¶ 1, Ex. 1. *The What*, in comparison, is a spare, low-fidelity track clearly grounded in the genre of hip-hop. *Id.*

**2. The Songs Have Entirely Different Means Of Vocal Performance**

The vocal parts of *Can't Say Enough* are entirely sung, including the use of multiple back-up singers. *Id.* In *The What*, there is no apparent singing at all – only the spoken-word "rapping" of Mr. Wallace and Clifford Smith ("Mr. Smith"). *Id.*

**3. The Songs Have Entirely Different Uses Of Rhythm And Tempo**

*Can't Say Enough* contains a driving, shifting, and exuberant beat, as well as a dynamic melody that evolves and continually crescendos over its six-minute length. *Id.* Moreover, the song, while always rapid, appears to contain several shifts in tempo and time signature



throughout the Master Recording and Composition. *Id.* In comparison, *The What* contains no melodic line, substituting in its place a sluggish “fixed and looped beat” that repeats without changing or developing over the song’s length. *Id.*

**4. The Songs Have Entirely Different Sonic Emphasis and Presentation**

In *Can’t Say Enough*, Mr. Hutson’s voice melds seamlessly and is at times subsumed into the rich and multi-layered orchestrations of *Can’t Say Enough*. *Id.* In comparison, the sparse beat and lack of melody in *The What* create a unique and distinctly different sonic emphasis and presentation, minimizing the importance of the “fixed and looped beat” into the background and drawing the listener’s attention to carefully observe and consider Mr. Wallace and Mr. Smith’s lyrical content. *Id.*

**5. The Songs Have Diametrically Opposed Lyrics and Subject Matters**

In addition to how they are presented within the respective Songs, a comparison of lyrics between *Can’t Say Enough* and *The What* dramatically accentuates the lack of substantial similarity between the Songs. *Id.* *Can’t Say Enough* is an loving ode to the singer’s mother, praising her sacrifices for the betterment of her family: “*Oh, well I can’t say enough about Mama / Gave the best years of her life / being a mother and a wife / for another.*” *Id.* In comparison, *The What* is a boastful, brazen, and often misogynistic proclamation of the rappers’ sexual, financial, and physical braggadocio: “*B-----es I like them brainless / Guns I like them stainless steel / I want the f---- fortune like the Wheel / I squeeze gats till my clips is empty / Don’t tempt me / You don’t want to f--- with Biggie.*” *Id.*

\* \* \*

In sum, substantial similarity cannot be established: no reasonable, ordinary observer listening to *Can't Say Enough* and *The What* would determine that they are musically, sonically, or aesthetically the same.

**D. If Any Similarities Exist Between The Songs, They Are Not Of Protectable Elements**

Although not alleged, a review of Mr. Hutson's demand letters combined with Defendants' analysis of the Songs reveals only one nexus between them – both utilize the isolated use of a single guitar chord that has been channeled through a guitar pedal effects unit, commonly known as a “wah-wah” pedal. The “wah-wah” pedal is among the most common, trite, and generic guitar effects in modern music; versions of it have been available for purchase and used in popular music recordings since 1967. See Bacon, Tony. *Fuzz & Feedback: Classic Guitar Music of the '60s*. (Hal Leonard Corp. 2000), p. 8. Since its introduction, the “wah-wah” guitar effect has been commonly used across all genres of music, from rock n' roll (Cream, *White Room*), to funk (Issac Hayes, *Theme From "Shaft"*), to psychedelica (Jimi Hendrix, *The Star Spangled Banner*), to pop (Prince, *Fury*), to hip-hop (The Roots, *The Fire*).

Plaintiff cannot claim infringement by Defendants, as the only similarity between the Songs is their shared and generic use of a commonly-used guitar effect. This is not enough to sustain a claim for copyright infringement.

**E. A Comparison Of Each Work's Use Of The "Wah-Wah" Pedal Reveals A Complete Lack Of Substantial Similarity Between Them**

For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement. See *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74-75 (2d Cir. 1997). This means that even if copying is conceded, no legal consequences will follow from that fact unless the copying is substantial. See *Laureyssens*, 964

F.2d at 140; *See Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 632 (S.D.N.Y. 2008) (dismissing copyright infringement claim when copying was *de minimis*); *see also Castle Rock Entm't Inc. v. Carol Publ'g Grp. Inc.*, 150 F. 3d 132, 137-38 (2d Cir. 1998) (holding that for substantial similarity to exist, the amount copied must be “more than *de minimis*”); *see also Bell*, 2001 WL 262718, at \*3-4; 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03 [A], at 13–45 (“It is clear that slight or trivial similarities are not substantial and are therefore noninfringing.”).

This principle – that trivial copying does not constitute actionable infringement – has long been ingrained into copyright law, as observed by Judge Learned Hand over 80 years ago: “Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent.” *West Publ'g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (E.D.N.Y. 1909).

As discussed *supra*, *Can't Say Enough* and *The What* both allegedly utilize an isolated and evident “wah-wah” guitar effect, which is applied to a single chord played by a guitarist. *Badway Decl.* ¶ 3, Ex. 3, Tracks 1 and 2. The “wah-wah” effect, however, is not used in the same manner in the Songs nor is sonically similar.

In *Can't Say Enough*, the “wah-wah” effect is only used once, in the “fade out” – the final moments at the conclusion of over six minutes of music – where a single Ebm9 chord appears to be overlaid with a fading “back-up” vocal. *Id.* The “wah-wah” effect is presented as a high-fidelity, fast-paced, and faint tone oscillating between high and low frequencies. *Id.* It is not part of any other sustained pattern in the song. *Id.*

Comparatively, in *The What*, the use of a “wah-wah” guitar effect is limited to a short, “chopped” “wah-wah” tone, followed by a one-beat tone, followed by a rest, and then followed

by the “chopped” one-beat tone repeated again twice. *Id.* This complex sequence is then repeated, without variation, during *The What*’s four-minute length. *Id.* In the entirety of *The What*, only two non-sequential “wah-wah” tones are utilized.

Sonically, the “wah-wah” effect is also not similar. Comparing the *The What* to *Can’t Say Enough*, the “wah-wah” effect in *The What* is in a significantly lower key, and is presented as a sluggish low-fidelity sound with only the high-end frequencies (as opposed to base frequencies) of the effect presented to the listener. *Id.* Moreover, the “wah-wah” sound in *The What* is further obscured by original guitar and bass lines, as well as an additional organ track. *Id.*

Thus, even if the Songs share a “wah-wah” effect, and the uses of that effect The use of a single chord simply does not rise to the level of “substantial” copying sufficient to support a claim of copyright infringement. *Newton*, 388 F. 3d at 1195-96 (holding that the direct copying and repeated “looping” of a “three-note sequence” into a hip-hop recording was not qualitatively or quantitatively substantial enough to support a claim of copyright infringement); *Poindexter*, *supra*, 2012 WL 1027639 at \*4-5 (holding that the repeated “looping” of a two-second tone from the introduction of plaintiff’s recording was not substantial enough to support a claim of copyright infringement); *Swirsky v. Carey*, 376 F. 3d 841, 851 (9th Cir. 2004) (“[A] single musical note would be too small a unit to attract copyright protection (one would not want to give the first author a monopoly over the note of B-flat, for example)”; *McDonald v. Multimedia Ent’mt, Inc.*, 1991 WL 311921 (S.D.N.Y July 19, 1991) (“[I]t is extremely doubtful that [a] single note and its placement in the composition is copyrightable”).

In sum, substantial similarity cannot be established: no reasonable, ordinary observer listening to *Can't Say Enough* and *The What* would determine that they are musically, sonically, or aesthetically the same.

### POINT III

#### PLAINTIFF'S COPYRIGHT INFRINGEMENT CLAIMS ALSO FAIL BECAUSE WARNER OWNS A COPYRIGHT INTEREST IN BOTH THE MASTER RECORDING AND THE COMPOSITION

During all time periods relevant to this matter, WMG has an ownership interest in both the Master Recording and the Composition. FAC, D.I. 19 at ¶¶ 23, 37; Badway Decl., ¶¶ 9 & 10. Thus, any claim for copyright infringement against WMG, and the Related Warner Parties as licensees of WMG, necessarily fails. WMG cannot infringe upon a work it owns. *Comter v. Israel*, 732 F. 2d. 267, 271 (2d Cir. 1984) (“It is elementary that the lawful owner of a copyright is incapable of infringing a copyright interest that is owned by him; nor can a joint owner of a copyright sue his co-owner for infringement.”). Accordingly, the copyright infringement claims against WMG, and its entities<sup>7</sup> – including the Related Warner Parties– must be dismissed.

As co-owner of a copyrighted work, WMG may unilaterally grant non-exclusive licenses for that work. *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007). The licensing co-owner has a duty to account to other co-owners for income gained through the license. *Id.* Because of this duty to account, licensees are not liable to a non-licensing co-owner for copyright infringement and “need not pay any royalties or other consideration to the co-owners who are not parties to the license agreement.” *Id.*; *Geshwind v. Garrick*, 734 F. Supp. 644, 651 (S.D.N.Y. 1990), *vacated in part on other grounds in Geshwind v. Garrick*, 738 F. Supp. 792 (S.D.N.Y. 1990), (“A joint

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<sup>7</sup> As stated above, these entities include Defendant Bad Boy Entertainment, as it is a joint venture with WMG.

owner of a work does not need the permission of his joint owner to use or license the work, and neither he nor a party to whom he gives permission to use the work can be held liable to the other owner for infringement.”); *Jasper v. Sony Music En’t, Inc.*, 378 F. Supp. 2d 334, 346 (S.D.N.Y. 2005) (“so long as any Isley Brother licensed these rights to CBS/Sony, [Plaintiff] cannot assert a claim for infringement against Sony.”).

As set forth above, WMG controls both *The What* and *Can’t Say Enough*. Thus, WMG authorized the Related Warner Parties to use *Can’t Say Enough* to the extent it can be found that this work was used in *The What*. Therefore, as licensees, the Related Warner Parties cannot be found liable for copyright infringement and the claims against them must be dismissed.

**POINT IV**

**THE COPYRIGHT INFRINGEMENT CLAIM IS PARTIALLY BARRED BY THE STATUTE OF LIMITATIONS**

The limitations period governing copyright infringement is three years. 17 U.S.C. § 507(b). Without exception, damages are limited to those accrued during the three years preceding the filing of the suit. *Stone v. Williams*, 970 F.2d 1043, 1049-50 (2d Cir. 1992); *Sharp v. Patterson*, 2004 WL 2480426, at \*11-12 (S.D.N.Y. Nov. 3, 2004); *Salerno v. City University of New York*, 191 F. Supp. 2d 352, 357 (S.D.N.Y. 2001) (“only [infringing acts] that occurred within three years of the filing of the action would be viable”).

Accordingly, to the extent that Plaintiff’s claims of copyright infringement are not dismissed, his damages must be limited to those that accrued after April 2, 2011, the date three years before Plaintiff filed the original complaint.

**POINT V**

**COUNTS 4, 5 AND 6 MUST BE DISMISSED AS THEY ARE REMEDIES, NOT CAUSES OF ACTION**

Finally, Counts 4, 5, and 6 of the FAC should be dismissed because they fail to state a claim upon which relief may be granted. The Court's task on a motion to dismiss is to "consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief," *Iqbal*, 556 U.S. at 681 – not to determine the appropriate remedy, if any.

Here, Count 4 purports to plead a cause of action for "Injunctive Relief and Impoundment." Count 5 purports to plead a cause of action for "Attorney's Fees." Count 6 purports to plead a cause of action for "Prejudgment Interest." Each of the foregoing requests are remedies, and do not state a claim for relief. See *Mitchell & Webster, Inc. v. Williamsbridge Mills, Inc.*, 14 F. Supp. 954, 956-57 (S.D.N.Y. 1936); *Miller v. Wells Fargo Bank, N.A.*, 2014 WL 349723, at \*11 (S.D.N.Y. Jan. 30, 2014) (Causes of action for injunctive relief dismissed as a remedy). *Mercer v. Mercer*, 2014 WL 3652698, at \*7 (E.D.N.Y. July 21, 2014) (dismissing a cause of action for "attorneys' fees" as a request for relief); *Commercial Union Assur. Co., PLC v. Milken*, 17 F.3d 608, 614 (2d Cir. 1994) (defining "prejudgment interest" as an "equitable remedy," not a cause of action).

Accordingly, Defendants respectfully request the Court dismiss Counts 4, 5 and 6.

**CONCLUSION**

For all the foregoing reasons, the Defendants respectfully request that the Court grant their motion to dismiss the complaint with prejudice, or, alternatively, limit any potential award of damages to the three years prior to the filing of the Complaint, together with reasonable attorney's fees and costs and such other and further relief as this Court deems just and proper.

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Respectfully submitted,

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