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13 SONY MUSIC ENTERTAINMENT

14 **UNITED STATES DISTRICT COURT**  
15 **CENTRAL DISTRICT OF CALIFORNIA**

16 THE MUSIC FORCE, LLC,

17 Plaintiff

18 v.

19 SONY MUSIC ENTERTAINMENT;  
20 MONTERO LAMAR HILL, AKA  
21 LIL NAS X; JEFFRY MAXWELL  
22 NEWLIN, AKA WYNTERBEATS  
23 and DOES 1 – 100,

24 Defendants

Case No. 2:19-cv-06430 – FMO (RAOx)

25 **SONY MUSIC**  
26 **ENTERTAINMENT’S NOTICE OF**  
27 **MOTION AND MOTION TO**  
28 **DISMISS THE SECOND AMENDED**  
**COMPLAINT; MEMORANDUM OF**  
**POINTS AND AUTHORITIES IN**  
**SUPPORT THEREOF**

Date: April 9, 2020

Time: 10:00 a.m.

Place: Courtroom 6D

Hon. Fernando M. Olguin

**TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF  
RECORD:**

PLEASE TAKE NOTICE that on April 9, 2020 at 10:00 a.m., or as soon thereafter as the parties may be heard, before the Honorable Fernando M. Olguin, United States District Judge, in Courtroom 6D of the United States District Court for the Central District of California, located at the First Street Courthouse, 350 W. 1st Street, 6th Floor, Los Angeles, California 90012, defendant Sony Music Entertainment (“Sony”) will and hereby does move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing each claim asserted against it in the Second Amended Complaint by plaintiff The Music Force, LLC (“Plaintiff”) on the grounds that such claims fail to state a claim as a matter of law.

This motion is based upon this Notice of Motion and the attached Memorandum of Points and Authorities; the pleadings and papers on file in this action; such other and further matters of which this Court must or may take judicial notice; and such arguments as may be presented to this Court at or before the hearing on this Motion.

This motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place telephonically on February 26, 2020.

Respectfully submitted,

Dated: March 4, 2020

**KATTEN MUCHIN ROSENMAN LLP**

By: /s/ Joanna M. Hill

Attorneys for Defendant

SONY MUSIC ENTERTAINMENT

## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. INTRODUCTION**

Plaintiff The Music Force LLC (“Plaintiff”) brought this action against three defendants it claims infringed on its copyright in the musical composition entitled “Carry On.” The majority of Plaintiff’s allegations relate to conduct by only two of the three defendants, Montero Lamar Hill p/k/a Lil Nas X (“Lil Nas”) and Jeffery Newlin p/k/a Wynterbeats (“Wynter”). In particular, Plaintiff alleges that Lil Nas and Wynter created and recorded a new song that appropriated elements of “Carry On,” and distributed it online. Notably, the Second Amended Complaint (“SAC”) contains no allegations that the remaining defendant, Sony Music Entertainment (“Sony”), in any way participated in or authorized the alleged infringing conduct by Lil Nas or Wynter.

According to the SAC, Sony’s only role was to acquire, after the fact, the recording at issue, and there are no allegations that Sony created, reproduced, or distributed it. Instead, Plaintiff alleges that after having entered into a recording agreement with Lil Nas (at which point the purportedly infringing song was already available online), Sony failed to have the infringing song removed from online platforms like YouTube. Then, in conclusory fashion, Plaintiff states that Sony has a “direct financial interest” in the online platforms and Lil Nas’s career but does not explain how this could be given that Sony did not reproduce or distribute the infringing song. In other words, the factual allegations do not support a claim for copyright infringement (either directly or vicariously) against Sony, and (as Plaintiff knows) no pleading grounded in fact could. Because Plaintiff’s other claims are predicated on the alleged copyright infringement, the SAC fails to state any claim against Sony. Sony therefore requests that the Court grant this motion and dismiss all claims against it with prejudice.

## II. PROCEDURAL HISTORY

On January 2, 2020, this Court granted Sony's previous motion to dismiss Plaintiff's original Complaint with leave to amend. (ECF No. 64.) Plaintiff filed a First Amended Complaint on January 9, 2019. (ECF No. 68.) On February 19, 2020, Plaintiff filed the operative SAC naming Sony, Lil Nas and Wynter as defendants. (ECF No. 81.)

In the Court's January 2 Order, it held that "Plaintiff's primary allegations" with respect to the prior Sony defendants were not sufficient to support a claim against them. (ECF No. 64 at 2.) Namely, the allegations that the Sony defendants "'acquired all rights to services of and recordings of" the allegedly infringing recording, and that they allegedly failed to stop the infringement by other defendants, after the other defendants had made the recording at issue" was not enough to establish liability for either direct or vicarious copyright infringement. (*Id.*) The Court granted Plaintiff leave to amend but noted that any amended complaint "should set forth more extensive factual allegations to support its claims against the Sony defendants."

## III. SALIENT NEW ALLEGATIONS

In the SAC, Plaintiff repeats many of the same allegations from the original Complaint. Specifically, Plaintiff re-alleges that it "owns all rights of" a musical composition written by Bobby Caldwell entitled "Carry On." (SAC ¶ 11; *see also id.* ¶ 20.) Plaintiff again claims that co-defendants, Lil Nas and Wynter, without authorization, appropriated parts of this composition in creating a new song by the same name. (*Id.* ¶ 12.)<sup>1</sup> Plaintiff further alleges that Lil Nas posted a recording of

<sup>1</sup> In the SAC, Plaintiff oddly omits Wynter's role in the creation of the infringing song even though the original Complaint states that he and Lil Nas created the infringing song. This is likely because Plaintiff has entered into a settlement agreement with Wynter, the terms of which have not been disclosed.

1 the new song on various internet and streaming platforms, including YouTube,  
2 Spotify, and SoundCloud. (*Id.* ¶ 13.)

3 The SAC contains almost no new factual allegations relating to actions by  
4 Sony. Plaintiff alleges only that, in June 2019, Sony “acquired all rights to  
5 services of and recordings of [Lil Nas]” which included “a financial interest in [Lil  
6 Nas’s] music.” (*Id.* ¶ 14.) Plaintiff also alleges that “SONY never requested, or  
7 failed to sufficiently request, that the song be removed from websites such as  
8 [YouTube]” and “has a financial interest in the publication of ‘Carry On’” on  
9 websites like YouTube, Spotify and SoundCloud. (*Id.* ¶¶ 15-16.) Based solely on  
10 these allegations, Plaintiff purports to assert claims against Sony for: (1) copyright  
11 infringement; (2) a declaration of authorship/ownership; (3) an accounting; and (4)  
12 unjust enrichment.

13 The SAC also includes conclusory allegations that “each Defendant was the  
14 agent, principal and/or employee of each other in the acts, conduct and omissions  
15 alleged herein” and that “all such Defendants were acting within the course and  
16 scope of their employment and and/or said agency.” (*Id.* ¶ 10.) However, the SAC  
17 is devoid of any factual allegations establishing an agency or employment  
18 relationship among any of the defendants.

#### 19 **IV. LEGAL STANDARD**

20 To withstand a Rule 12(b)(6) motion to dismiss, a plaintiff must allege  
21 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp.*  
22 *v. Twombly*, 550 U.S. 544, 570 (2007). A claim has “facial plausibility” when the  
23 plaintiff pleads “factual content” that “allows the court to draw a reasonable  
24 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,  
25 556 U.S. 662, 663 (2009). Although a plaintiff’s allegations are generally taken as  
26 true, neither “‘label and conclusions’” nor “‘naked assertions’ devoid of ‘further  
27 factual enhancement’” will suffice. *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557)

(internal brackets omitted). The plausibility standard “asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557).

## V. ARGUMENT

### A. Plaintiff’s SAC Fails to Satisfy the Court’s January 2, 2020 Order Granting Leave to Amend.

Plaintiff’s SAC fails to address the Court’s January 2 Order to “set forth more extension factual allegations to support its claims against the Sony defendants.” (ECF No. 64 at 2.) Plaintiff may use different words but it is still alleging the same “facts” the Court previously found to be insufficient to support a claim against Sony: (1) Sony acquired the rights to the infringing song after the song was created; and (2) Sony failed to stop or remove the infringing song from third party platforms after it was posted online. The only different and possibly new fact Plaintiff alleges is that Sony has a financial interest in the career of the purported infringer, Lil Nas, and a financial interest in the infringing song via third party websites like YouTube. But with no factual allegations as to how a party who has not created, reproduced, or distributed an allegedly infringing work has a direct financial interest in these alleged activities by third parties, the revised allegations of the SAC are insufficient to establish any copyright infringement liability on the part of Sony.

### B. Plaintiff’s Copyright Infringement Claim Against Sony Should Be Dismissed for Failure to State a Claim.

To state a claim for copyright infringement of a musical composition, a plaintiff must allege facts showing that the defendant violated at least one of the

1 five exclusive rights granted to copyright holders under 17 U.S.C. § 106. *See*  
 2 *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085, 1085 n.3 (9th Cir. 1989). Under  
 3 17 U.S.C. § 106, “the owner of copyright . . . has the exclusive rights to do and to  
 4 authorize any of the following:

- 5 (1) to reproduce the copyrighted work in copies or phonorecords;
- 6 (2) to prepare derivative works based upon the copyrighted work;
- 7 (3) to distribute copies or phonorecords of the copyrighted work to the  
 8 public by sale or other transfer of ownership, or by rental, lease, or lending;
- 9 (4) in the case of . . . musical . . . works . . . , to perform the copyrighted  
 10 work publicly;
- 11 (5) in the case of . . . musical . . . works, . . . to display the copyrighted work  
 12 publicly . . . .”<sup>2</sup> 17 U.S.C. § 106.

13 Without an allegation that one or more of these exclusive rights was  
 14 infringed *by Sony*, the SAC fails to state a cause of action.

15 Here, the SAC fails to allege that Sony violated any of these rights. There  
 16 are no allegations that Sony reproduced, distributed, or publicly performed or  
 17 displayed “Carry On,” or that Sony created a derivative work based upon “Carry  
 18 On.” Nor are there any allegations that Sony directed or authorized anyone else to  
 19 do any of these things.

20 Further, there are no factual allegations from which it can be inferred that  
 21 Sony violated any of Plaintiff’s exclusive rights. Again, Plaintiff’s only allegation  
 22 concerning Sony is that after the infringing conduct occurred by others (copying  
 23 and distribution of the work on various internet sites), Sony acquired the rights to  
 24 Lil Nas’s services and his existing recordings, including the recording of his

25 <sup>2</sup> Section 106 also establishes a sixth exclusive right for the owner of a  
 26 copyright in a sound recording. *See* 17 U.S.C. § 106(6). Plaintiff does not  
 27 allege that it owns the sound recording of the musical composition “Carry On,”  
 28 or that any of the defendants infringed on the sound recording.



1 composition entitled “Carry On.” (*See* SAC ¶ 14.) While the SAC alleges that  
 2 Sony took no action to remedy the infringement that had allegedly been committed  
 3 by Lil Nas and Wynter, and accepting for purposes of this motion the truth of this  
 4 allegation, it cannot support a claim of copyright infringement against any of the  
 5 Sony entities. *See Sloane v. Karma Enters., Inc.*, No. CV 08-05094 MMM  
 6 (VBKx), 2009 WL 10672982, \*6 (C.D. Cal. Apr. 13, 2009) (“Infringement of the  
 7 distribution right requires an actual dissemination of either copies or  
 8 phonorecords.”) (internal quotations and brackets omitted).

9 **C. Plaintiff Fails to Allege Even a Plausible Claim for Vicarious**  
 10 **Copyright Infringement.**

11 Plaintiff’s allegations suggest they seek to hold Sony liable for vicarious  
 12 infringement because Sony had “the ability to supervise the distribution and  
 13 publishing of [Lil Nas’s] music, including the infringing version of Carry On, from  
 14 the date that Sony signed the artist and continuing to the present” and “a direct  
 15 financial interest” in Lil Nas’s career and his infringing activity. (SAC ¶ 17.)

16 First, Plaintiff implicitly concedes that the infringing activity took place  
 17 before Sony signed Lil Nas but argues that Sony had an affirmative duty to  
 18 investigate and stop possible past infringement by others after it signed Lil Nas.  
 19 There are no facts alleged to support the proposition that Sony had the right and  
 20 ability to control the infringing activity, the first required element of vicarious  
 21 copyright infringement. Plaintiff alleges that third parties (without Sony’s  
 22 knowledge or involvement) posted infringing content on YouTube, and provides  
 23 no explanation regarding how Sony controlled these third parties (or YouTube, for  
 24 that matter). Moreover, Plaintiff provides no case law to support the novel  
 25 argument that a defendant’s failure to somehow cause a third party to remove  
 26 content from a platform that the defendant does not own or control (here,  
 27 YouTube) satisfies the first element of the claim.



Second, other than the “naked assertion” that Sony has a direct financial interest in the infringing activity via certain online platforms where Lil Nas purportedly published the infringing song, Plaintiff’s allegations are “devoid of ‘further factual enhancement’” explaining what financial interest or benefit Sony received as a result of Lil Nas’s infringement. *See Ashcroft*, 556 U.S. at 678. For example, Plaintiff does not and cannot allege that Sony ever registered the infringing song, took any steps to be identified as the copyright owner of the infringing song in order to seek any profits from its purported distribution by others, or uploaded the infringing song on YouTube or anywhere else online. Instead, Plaintiff just assumes that because Sony signed an artist who allegedly released an infringing song prior to entering into a deal with Sony, Sony by default has a financial interest in the infringing song via its general financial interest in the artist. But Plaintiff cannot reconcile its implicit acknowledgment that Sony did not distribute the infringing song with its allegation that Sony has a “direct financial interest” in the infringing song. Rather, Plaintiff is essentially asking the Court to make several assumptions in order to chain Sony to the conduct of others.

Accordingly, these allegations cannot be taken as true, and Plaintiff’s first cause of action for copyright infringement should be dismissed as to Sony.

**D. Plaintiff’s Remaining Causes of Action Should Be Dismissed For Failure to State a Claim.**

In addition to its cause of action for copyright infringement, Plaintiff alleges claims against Sony for a declaration of authorship/ownership, an accounting, and unjust enrichment. Each of these claims is based on the same allegations on which Plaintiff bases its claim for copyright infringement and is predicated on the alleged infringement. Thus, for the same reasons that Plaintiff’s infringement claim is deficient, its remaining claims also fail. *See Marcus v. ABC Signature Studios, Inc.*, 279 F. Supp. 3d 1056, 1073 (C.D. Cal.

1 2017) (absent a viable underlying claim for copyright infringement, plaintiff  
2 was not entitled to declaratory relief); *Campbell v. Walt Disney Co.*, 718 F.  
3 Supp. 2d 1108, 1116 (N.D. Cal. 2010) (holding that, where plaintiff failed to  
4 state a claim for copyright infringement, she also failed to state a claim for  
5 unjust enrichment based on defendants' alleged unauthorized use of her  
6 copyrighted material).

7 Accordingly, all claims against Sony should be dismissed.

8 **VI. CONCLUSION**

9 For all of the foregoing reasons, Sony requests that the Court grant its  
10 motion and dismiss all claims against it.

11  
12 Respectfully submitted,

13 Dated: March 4, 2020

**KATTEN MUCHIN ROSENMAN LLP**

14  
15 By: /s/ Joanna M. Hill

Attorneys for Defendant

SONY MUSIC ENTERTAINMENT