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8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 WESTERN DIVISION

12 CHRISTOPHER EDWARD COPE,
CHRISTOPHER EDWARD
13 MONTAGUE, FABIAN ANDRES
ACUNA, ADAM SPENCER KAMPF
14 and DENTON BEDWARD,

15 Plaintiffs,

16 v.

17 WARNER RECORDS, INC., a
Delaware corporation, DUA LIPA, an
18 individual, CLARENCE COFFEE, JR.,
an individual, SARAH HUDSON, an
19 individual, STEPHEN KOZMENIUK,
an individual and DOES 1 through 10,

20 Defendants.
21

CASE NO. 2:22-cv-01384 SSS (ASx)

Judge Sunshine Suzanne Sykes

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Time: 2:00 p.m.
Date: December 16, 2022

File Date: March 1, 2022
Trial Date: None Set

*[Declaration of David A. Steinberg and
[Proposed] Order Submitted
Concurrently Herewith]*

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on December 16, 2022, in the

courtroom of the Honorable Sunshine Suzanne Sykes of the United States District Court for the Central District of California, 3470 Twelfth Street, Courtroom 2, Riverside, CA 92501, at 2:00 p.m., or as soon thereafter as the matter may be heard, Defendants Warner Records Inc., Dua Lipa, Clarence Coffee, Jr., Sarah Hudson, and Stephen Kozmeniuk (collectively, “Defendants”), shall and hereby do move this Court pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing the First Amended Complaint (“FAC”) filed by Plaintiffs Christopher Edward Cope, Christopher Edward Montague, Fabian Andres Acuna, Adam Spencer Kampf, and Denton Bedward (collectively, “Plaintiffs”) on September 19, 2022, in its entirety.

This Motion is made on the grounds that Plaintiffs fail to sufficiently plead that Defendants had access to “Live Your Life” before creating “Levitating” or that the works are substantially similar, both of which are basic and necessary elements of their copyright infringement claim.

This Motion is and will be based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of David A. Steinberg (“Steinberg Decl.”), the pleadings and orders in the Court’s files for this case, any matters on which the Court may or must take judicial notice, any reply that is filed in support of this Motion, any argument presented at the hearing on this Motion, and any other matters the Court deems proper.

1 This Motion is made following the conference of counsel, held pursuant to
2 Local Rule 7-3, that took place via telephone conference on November 7, 2022.
3 Steinberg Decl., ¶ 4.

4
5 DATED: November 14, 2022

DAVID A. STEINBERG
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8 By: /s/ David A. Steinberg
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION¹

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Warner Records Inc. (“Warner”), Dua Lipa, Clarence Coffee, Jr., Sarah Hudson, and Stephen Kozmeniuk (collectively, “Defendants”) hereby move for an Order dismissing the First Amended Complaint (“FAC”) for copyright infringement filed by Plaintiffs Christopher Edward Cope, Christopher Edward Montague, Fabian Andres Acuna, Adam Spencer Kampf, and Denton Bedward (collectively, “Plaintiffs”) on September 19, 2022, in its entirety.

In the FAC, Plaintiffs allege that Defendants’ musical composition and sound recording “Levitating,” embodying the performance of Dua Lipa, infringes Plaintiffs’ copyright in the musical composition entitled “Live Your Life.” However, the FAC fails to comply with the most basic pleading requirements of the Federal Rules as applied to copyright infringement actions.

First, the FAC fails to allege under any plausible theory that the writers of “Levitating” had access to “Live Your Life” prior to creating “Levitating.” As discussed below, Plaintiffs must allege facts demonstrating those writers had a *reasonable possibility* of access to “Live Your Life” prior to creating “Levitating” either by demonstrating that “Live Your Life” was widely disseminated prior to the creation of “Levitating” or by alleging a chain of events linking “Live Your Life” to the “Levitating” writers. But Plaintiffs do not allege such facts. Instead, Plaintiffs assert vague allegations of purported unspecified performances and sales of “Live Your Life” with no detail whatsoever regarding the size, location, date, or number of the alleged performances, or the quantity, date and location of the purported sales of “Live Your Life.” And while Plaintiffs also attempt to plead access through the alleged dissemination of “Live Your Life” on the Internet, they

¹ Unless noted, all emphasis is added and all citations and quotation marks omitted.

1 also fail to provide a single fact or detail as to the number of streams or downloads
2 of the work. Similarly, Plaintiffs' tortuous chain of events allegations are based on
3 many degrees of separation and are far too attenuated to plead any "reasonable
4 possibility" of the "Levitating" writers' access to "Live Your Life." In other
5 words, even if true, Plaintiffs' access allegations could not, as a matter of law,
6 establish that the writers of "Levitating" had a reasonable opportunity to hear
7 "Live Your Life" prior to creating "Levitating."

8 Second, Plaintiffs fail to allege a single fact that identifies what material
9 from "Live Your Life" is copied in "Levitating." Instead, Plaintiffs merely
10 conclusorily allege purported similarities between the two works without any
11 factual detail whatsoever. As discussed below, Plaintiffs must allege facts that
12 could support a claim under the United States Copyright Act for infringement of
13 their alleged copyright, including, but not limited to, facts that demonstrate any
14 substantial similarities in original, protectable elements between "Live Your Life"
15 and "Levitating." But the FAC contains nothing more than blanket legal
16 conclusions unsupported by any facts, such as: "'Live Your Life' and 'Levitating'
17 are substantially similar in their main melodic theme, supportive harmonies, and
18 accompaniment" and "are both set to minor keys and have similar tempos and
19 overall feel or style." FAC, ¶¶ 27-28. These conclusory allegations are
20 insufficient to state a claim for copyright infringement.

21 As this Court is aware, this is Plaintiffs' second attempt at pleading a
22 copyright infringement claim. Plaintiffs' Initial Complaint (ECF 1) similarly failed
23 to allege any facts regarding the purported similarities between the works at issue
24 (alleging only that "'Levitating' is substantially similar to 'Live Your Life.'" *Id.*,
25 ¶ 18), or that Defendants had access to "Live Your Life" prior to the creation of
26 "Levitating." Prior to Plaintiffs' filing of the FAC, the parties met and conferred
27 regarding the Initial Complaint, and Defendants put Plaintiffs on express notice of
28 their deficient substantial similarity and access allegations. Plaintiffs then

1 amended the Initial Complaint as of right, and still failed to plausibly allege that
2 the “Levitating” writers had access to “Live Your Life” prior to the creation of
3 “Levitating” or to provide any factual or musicological support that “Levitating”
4 infringes any protectable expression in “Live Your Life.” Defendants submit that
5 Plaintiffs’ failure to allege such facts is intentional, because Plaintiffs know that
6 they cannot plead that the “Levitating” writers had the requisite access to “Live
7 Your Life” or that any actionable similarities exist between “Live Your Life” and
8 “Levitating.”

9 The FAC should be dismissed.

10 **II. FACTUAL BACKGROUND²**

11 Plaintiffs initiated this copyright infringement action against Defendants on
12 March 1, 2022. ECF 1. Following a meet and confer in which Defendants raised
13 deficiencies in Plaintiffs’ pleading (including as to Plaintiffs’ substantial similarity
14 and access allegations), Plaintiffs filed the FAC on September 19, 2022. ECF 52.

15 Plaintiffs allege that they are the authors and copyright owners of a musical
16 composition entitled “Live Your Life.” FAC, ¶¶ 14-15 & Ex. A. Plaintiffs allege
17 that Defendants’ musical composition and sound recording “Levitating” infringes
18 Plaintiffs’ copyright interests in the musical composition “Live Your Life.”³ *Id.*,
19 ¶¶ 14-30. Plaintiffs have asserted their claim for infringement against the four
20 writers of “Levitating”—Dua Lipa, Clarence Coffee, Sarah Hudson, and Stephen

21
22 _____
23 ² Any facts and/or allegations set forth herein taken from the FAC are presumed to
be true solely for purposes of this Motion.

24 ³ There are two types of musical works: sound recordings and their underlying
25 musical compositions. Each are separate works with their own distinct copyrights.
A musical composition consists of rhythm, harmony, melody, and structure
26 captured in written form. *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1249 (C.D.
27 Cal. 2002), *aff’d*, 388 F.3d 1189 (9th Cir. 2004). A musical composition copyright
protects the sound that would necessarily result from any performance of the piece.
Id. A sound recording, on the other hand, is the sound produced by a performer’s
28 rendition of a musical composition. *Id.* In this case, only the musical composition
“Live Your Life” is at issue; there is no allegation that the sound recording of
“Live Your Life” was sampled or otherwise infringed.

1 Kozmeniuk—and the record company that released the sound recording thereof,
2 Warner.

3 **A. The FAC’s Insufficient Access Allegations**

4 The FAC fails to plead sufficient factual allegations regarding the
5 “Levitating” writers’ purported access to “Live Your Life” prior to the creation of
6 “Levitating.” Plaintiffs appear to allege access based on two theories: widespread
7 dissemination and chain of events. Both access theories fail to state a claim for
8 copyright infringement.

9 Plaintiffs’ widespread dissemination allegations are based on (i) Plaintiffs’
10 alleged performances of “Live Your Life” at *unspecified venues in Florida* to
11 *audiences of unspecified size* from March 31, 2017 until August 28, 2018 (FAC,
12 ¶ 18); (ii) the alleged sale of only *several hundred* physical copies of *Smoke and*
13 *Mirrors* (the album containing “Live Your Life”) at a *local music store* and to
14 audiences of *unspecified size* at the various *unspecified venues* at which Plaintiffs
15 performed (*id.*, ¶ 23); (iii) the use of “Live Your Life” in a video commercial for a
16 “Beerfest” in Delray Beach, Florida which promoted local bars and restaurants (*id.*,
17 ¶ 21); (iv) the *Smoke and Mirrors* EP charting at #2 on Billboard’s Reggae chart in
18 April 2017 (*id.*, ¶ 19); and (v) the availability of “Live Your Life” for streaming
19 and/or download on various online platforms (*id.*, ¶ 22-23).

20 Plaintiffs’ “chain of events” access allegations appear to be based on the
21 following alleged facts: (i) Defendant Coffee is a member of a production team
22 that originated in Miami, Florida which produced *an entirely different song* on
23 Dua Lipa’s album (*not* “Levitating”), entitled “Break My Heart” (FAC, ¶¶ 24-25),
24 and (ii) Ali Tamposi, who is alleged to be one of the co-writers of “Break My
25 Heart” (*but not* “Levitating”), was taught guitar by Plaintiff Cope’s brother in law
26 and is connected to Cope on Facebook (where Cope posted unspecified news about
27 Plaintiffs’ reggae band) (*id.*, ¶ 26). None of these allegations, even if true, would

1 establish that the writers of “Levitating” had a reasonable opportunity to hear
2 “Live Your Life” prior to creating “Levitating.”

3 **B. The FAC’s Insufficient Substantial Similarity Allegations**

4 Nowhere in the FAC are there any factual allegations regarding alleged
5 similarities between original, protectable elements of “Live Your Life” and
6 “Levitating.” The only allegations proffered are the following vague, boilerplate
7 labels and conclusions: “‘Live Your Life’ and ‘Levitating’ are substantially similar
8 in their main melodic theme, supportive harmonies, and accompaniment” and “are
9 both set to minor keys and have similar tempos and overall feel or style.” FAC,
10 ¶¶ 27-28.

11 As noted above, the parties met and conferred following the filing of
12 Plaintiffs’ Initial Complaint and prior to the filing of the FAC regarding the
13 pleading deficiencies present in the Initial Complaint. During that meet and
14 confer, Defendants specifically addressed the deficiencies in Plaintiffs’ substantial
15 similarity and access allegations. Even after being put on notice of same, Plaintiffs
16 still failed to properly allege substantial similarity and access in filing the FAC.
17 The FAC should be dismissed in its entirety.

18 **III. LEGAL STANDARD**

19 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a
20 complaint when it does not contain enough facts to state a claim for relief that is
21 plausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
22 “A claim has facial plausibility when the plaintiff pleads factual content that allows
23 the court to draw the reasonable inference that the defendant is liable for the
24 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The
25 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more
26 than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting
27 *Twombly*, 550 U.S. at 556). While the Federal Rules of Civil Procedure do not
28 require “detailed factual allegations,” a pleading that offers mere “labels and

1 conclusions” or a “formulaic recitation of the elements of a cause of action will not
2 do.” *Twombly*, 550 U.S. at 555. “Nor does a [pleading] suffice if it tenders ‘naked
3 assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678. To
4 the contrary, to survive a motion to dismiss, a pleading “must contain sufficient
5 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
6 face.’” *Id.*; *Twombly*, 550 U.S. at 555 (“Factual allegations must be enough to
7 raise a right to relief above the speculative level”). “A claim has facial plausibility
8 when the plaintiff pleads factual content that allows the court to draw the
9 reasonable inference that the defendant is liable for the misconduct alleged.”
10 *Iqbal*, 556 U.S. at 678. Ascertaining whether there is a plausible claim for relief is
11 a “context-specific task that requires the reviewing court to draw on its judicial
12 experience and common sense.” *Id.* at 679.

13 Dismissal for failure to state a claim can be warranted based on either a lack
14 of a cognizable legal theory or the absence of factual support for a cognizable legal
15 theory. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th
16 Cir. 2008). While a court must accept the plaintiff’s factual allegations as true and
17 construe them in the light most favorable to the plaintiff, “[f]or an allegation to be
18 entitled to the assumption of truth, however, it must be well-pleaded; that is, it
19 must set forth a non-conclusory factual allegation rather than a legal conclusion.”
20 *Maiden v. Finander*, 2013 WL 5969840, at *2 (C.D. Cal. Nov. 6, 2013) (citing
21 *Iqbal*, 556 U.S. at 678-79); *see also Twombly*, 550 U.S. at 556. As such, “[t]he
22 Court need not accept as true unreasonable inferences, unwarranted deductions of
23 fact, or conclusory legal allegations cast in the form of factual allegations.”
24 *Maiden*, 2013 WL 5969840, at *2; *see also Adams v. Johnson*, 355 F.3d 1179,
25 1183 (9th Cir. 2004).

26 Dismissal under Rule 12(b)(6) is appropriate when a plaintiff fails to allege
27 access or delineate the basis upon which they claim that two works are
28 substantially similar. *See, e.g., Hayes v. Minaj*, 2012 WL 12887393, at *3-5 (C.D.

1 Cal. Dec. 18, 2012) (dismissing copyright claim regarding musical work where
 2 complaint failed to adequately allege substantial similarity and access); *Shaheed-*
 3 *Edwards v. Syco Entm't, Inc.*, 2017 WL 6403091, at *3 (C.D. Cal. Dec. 14, 2017)
 4 (“merely conclusory” allegations of similarity between musical works “fail[] to
 5 state a claim for copyright infringement”) (dismissing copyright claim); *Evans v.*
 6 *McCoy-Harris*, 2019 WL 1002512, at *3 (C.D. Cal. Jan. 4, 2019) (dismissing
 7 copyright claim for failure to plead substantial similarity: “conclusory statements
 8 do not satisfy *Iqbal*’s pleading standard”); *Mintz v. Subaru of Am., Inc.*, 716 F.
 9 App’x 618, 621 (9th Cir. 2017) (affirming grant of motion to dismiss: “[w]ithout
 10 specific allegations that any Subaru employee viewed any of the publications in
 11 which her designs were featured or that the publications were widely disseminated
 12 to the general public, Mintz has not plausibly alleged that Subaru had access to her
 13 works.”); *Star Fabrics, Inc. v. Wet Seal, Inc.*, 2014 WL 12591271, at *3-4 (C.D.
 14 Cal. Dec. 2, 2014) (granting motion to dismiss for failure to plead access via chain
 15 of events or widespread dissemination).⁴

16 The FAC should be dismissed because Plaintiffs utterly fail to allege any
 17 facts that, even if true, could establish access; nor do the FAC’s allegations
 18 remotely satisfy the standard for pleading substantial similarity. These conclusory
 19 and vague allegations are insufficient to state a claim for copyright infringement.

20 **IV. THE FAC FAILS TO STATE A CLAIM FOR COPYRIGHT**
 21 **INFRINGEMENT**

22 To establish copyright infringement, a plaintiff must prove two elements:
 23 (1) ownership of a valid copyright and (2) copying of protected aspects of the
 24

25 ⁴ See also *Arnett v. Jackson*, 2017 WL 3493606, at *3 (E.D.N.C. Aug. 14, 2017)
 26 (granting motion to dismiss with prejudice where plaintiff failed to sufficiently
 27 allege access); *Feldman v. Twentieth Century Fox Film Corp.*, 723 F. Supp. 2d
 28 357, 366 (D. Mass. 2010) (dismissing copyright infringement claim because
 plaintiff “failed to allege facts sufficient to demonstrate reasonable opportunity of
 access”); *Clanton v. UMG Recordings, Inc.*, 556 F. Supp. 3d 322, 328 (S.D.N.Y.
 2021) (granting motion to dismiss based on failure to sufficiently plead access).

1 work. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020); *Loomis v.*
2 *Cornish*, 836 F.3d 991, 994 (9th Cir. 2016). Regarding the latter element,
3 “[a]bsent direct evidence of copying,” Plaintiffs must prove that: (1) the
4 “Levitating” writers had access to “Live Your Life” before creating “Levitating”
5 and (2) “Live Your Life” and “Levitating” are substantially similar in original,
6 protectable expression. *Loomis*, 836 F.3d at 994; *Skidmore*, 952 F.3d at 1064; *see*
7 *also Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1076 (9th Cir.
8 2006).

9 Plaintiffs fail to sufficiently plead either element of their infringement claim.
10 The FAC should be dismissed.

11 **A. Plaintiffs Fail To Adequately Allege Access**

12 Plaintiffs fail to adequately allege that the writers of “Levitating” had access
13 to “Live Your Life” before creating “Levitating.” In the copyright context, access
14 means that the creators of the allegedly infringing work had “an opportunity to
15 view or to copy plaintiff’s work.” *Loomis*, 836 F.3d at 995. “[A] plaintiff must
16 show a **reasonable possibility**, not merely a bare possibility, that an alleged
17 infringer had the chance to view the protected work.” *Art Attacks Ink, LLC v.*
18 *MGA Entm’t Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009). Put differently, a
19 reasonable opportunity requires more than mere speculation or conjecture and
20 “does not encompass any bare possibility in the sense that anything is possible.”
21 *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (quoting 4
22 Nimmer on Copyright § 13.02[A] (1999)).

23 Access can be proven through direct evidence of access or, “[w]here there is
24 no direct evidence of access, circumstantial evidence can be used to prove access
25 either by (1) establishing a chain of events linking the plaintiff’s work and the
26 defendant’s access, or (2) showing that the plaintiff’s work has been widely
27 disseminated.” *Loomis*, 836 F.3d at 995. Here, Plaintiffs do not allege direct
28 access. Instead, Plaintiffs attempt to allege access based on the purported

1 widespread dissemination of “Live Your Life” and through purported
 2 circumstantial evidence establishing a chain of events linking “Live Your Life” to
 3 the “Levitating” writers. Plaintiffs fail to state a claim under either theory.

4 **1. Plaintiffs Fail To Sufficiently Plead Access Through The**
 5 **Purported Widespread Dissemination Of “Live Your Life”**

6 In order to plead widespread dissemination, a plaintiff must allege its work
 7 “*saturat[ed]* a relevant market *in which both the plaintiff and the defendant*
 8 *participate[d].*” *Loomis*, 836 F.3d at 997. Widespread dissemination “centers on
 9 the degree of a work’s commercial success and on its distribution through radio,
 10 television, and other relevant mediums.” *Id.* In that regard, “the public
 11 dissemination necessary to infer that a defendant might have had access to the
 12 work is considerable.” *Loomis v. Cornish*, 2013 WL 6044345, at *10 (C.D. Cal.
 13 Nov. 13, 2013), *aff’d*, 836 F.3d 991. “As a general matter, in order for a work to
 14 be widely disseminated, *it must achieve a high degree of commercial success* or
 15 be readily available in the market.” *Id.* (collecting cases).

16 Plaintiffs’ widespread dissemination theory is based on: (i) Plaintiffs’
 17 alleged performances of “Live Your Life” at *various unspecified venues in Florida*
 18 *to audiences of unspecified size* from March 31, 2017 until August 28, 2018 (FAC,
 19 ¶ 18); (ii) the alleged sale of only *approximately several hundred* physical copies
 20 of *Smoke and Mirrors* at a *local music store* and to audiences of *unspecified size* at
 21 the various *unspecified venues* at which Plaintiffs allegedly performed (*id.*, ¶ 23);
 22 (iii) the use of “Live Your Life” in a video commercial for a “Beerfest” in Delray
 23 Beach, Florida which promoted local bars and restaurants (*id.*, ¶ 21); (iv) the
 24 *Smoke and Mirrors* EP containing “Live Your Life” charting at #2 on Billboard’s
 25 Reggae chart in April 2017 (*id.*, ¶ 19); and (v) the availability of “Live Your Life”
 26 for streaming and/or download on various online platforms (*id.*, ¶ 22-23). Even if
 27 true, these allegations do not sufficiently allege that “Live Your Life” was so

1 widely disseminated as to make it reasonably possible that the “Levitating” writers
2 had the opportunity to hear it before creating “Levitating.”

3 **a. Plaintiffs’ Vague Allegations Of Unspecified**
4 **Performances And Sales Of “Live Your Life” And**
5 **Alleged Critical Acclaim Are Insufficient**

6 Plaintiffs’ allegations as to their purported performances and sales of “Live
7 Your Life” fail to sufficiently plead widespread dissemination. Plaintiffs do not
8 plead any details whatsoever regarding the size, location, date, or number of
9 alleged performances that took place, or the quantity, date and location of the
10 purported sales of “Live Your Life.” Instead, the FAC only conclusorily and
11 vaguely alleges that, during an approximate one-year period, “Live Your Life” was
12 allegedly performed “in *numerous venues*” and its album sold “*approximately*
13 *several hundred* physical copies at a *local music store* and to audiences at the
14 various venues at which it played.” FAC, ¶¶ 18, 23. These allegations are
15 insufficient. *See, e.g., Klauber Brothers, Inc. v. P.J. Salvage*, 2018 WL 6984817,
16 at *4 (C.D. Cal. Oct. 30, 2018) (dismissing complaint that did not state “the
17 approximate quantity of products sampled and sold, the approximate number of
18 parties in the fashion and apparel industries to whom the Lace Designs were
19 distributed, the channel(s) of distribution, the approximate time of this distribution
20 and whether that was before or after Defendants’ purported infringing activities”);
21 *Star Fabrics*, 2014 WL 12591271, at *4 (no widespread dissemination alleged
22 where plaintiff “does not allege the approximate quantity of fabric bearing the
23 design that it has distributed [or] the approximate number of parties in the fashion
24 and apparel industries to whom it has distributed the design”).⁵

25 _____
26 ⁵ Even assuming that Plaintiffs’ allegation as to several hundred sales of its album
27 is true, that allegation would likewise fail to support a widespread dissemination
28 theory. *See, e.g., Art Attacks Ink*, 581 F.3d at 1144 (T-shirt design not widely
disseminated where plaintiff sold 2,000 shirts a year and displayed the design at
fair booths and store kiosks); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th
Cir. 2003) (no widespread dissemination where plaintiff sold 17,000 copies of a

1 Importantly, the FAC alleges that such performances and hard copy sales
 2 took place *in Florida*. See, e.g., *id.*, ¶ 18 (performances “principally in Florida”);
 3 ¶ 21 (“video commercial for Delray Beach, Florida’s ‘Beerfest 2018,’ which
 4 promoted tours of local bars and restaurants”); ¶ 23 (album sold “at a local music
 5 store and to audiences at the various venues at which it played”). The FAC is
 6 devoid of any facts alleging that the “Levitating” writers attended or were aware of
 7 these performances, or that they participated in the “local” Florida music scene in
 8 which Plaintiffs participated. Indeed, the FAC does not allege any facts
 9 connecting the “Levitating” writers to Florida whatsoever.

10 These allegations cannot reasonably satisfy Plaintiffs’ pleading obligations.
 11 Courts consistently reject access based on purported widespread dissemination
 12 where, like here, a plaintiff’s work only reached a limited audience. In that regard,
 13 the Ninth Circuit’s decision in *Loomis v. Cornish* is directly on point. In *Loomis*,
 14 the plaintiff argued access based on the fact that the defendant songwriters were in
 15 Santa Barbara for writing sessions at the time when Santa Barbara was “saturated”
 16 with the allegedly infringed work through “tons of airplay” on local radio stations
 17 and due to various newspapers writing stories about the plaintiff’s band’s
 18 achievements. 836 F.3d at 998. The Court held that these facts could not establish
 19 access through widespread dissemination as a matter of law:

20 [The defendants] were not participating in the relevant
 21 market—the Santa Barbara local music scene—during
 22 their brief stay in Santa Barbara. Their production
 23 responsibilities had nothing to do with listening to local
 24 radio, reading local press, or scouting local bands, and
 25 there was no evidence that they undertook any other

26
 27 video over a 13-year period); *Jason v. Fonda*, 526 F. Supp. 774, 776-77 (C.D. Cal.
 28 1981) (book sales of no more than 2,000 copies nationwide and no more than 700
 copies in Southern California were insufficient).

1 activity in that market that created a reasonable
2 possibility of access to Bright Red Chords. Although
3 there was a *bare possibility* that they heard Bright Red
4 Chords on the radio, or that they read about Loomis and
5 the Lust in a magazine in the break room of Playback
6 Studios, or that they picked up one of Loomis’s
7 promotional CDs while at Playback, that is not enough to
8 raise a triable issue of access.

9 *Id.* Numerous other cases are in accord. *See, e.g., Guzman v. Hacienda Records &*
10 *Rec. Studio, Inc.*, 2014 WL 6982331, at *2, 5-6 (S.D. Tex. Dec. 9, 2014), *aff’d* 808
11 F.3d 1031 (5th Cir. 2015) (no widespread dissemination or access where plaintiff’s
12 song was performed for many years “at dance halls, concerts, and weddings in
13 Corpus Christi and surrounding towns” and “did not achieve popularity outside of
14 the Tejano music scene”); *Batiste v. Lewis*, 976 F.3d 493, 503-04 (5th Cir. 2020)
15 (no access under either a widespread dissemination or chain of events theory where
16 plaintiff’s record “show[ed] meager sales in only a handful of local stores[,]” and
17 defendants’ performance near a store where plaintiff’s records were sold created
18 only a “bare possibility of access”); *Loomis*, 2013 WL 6044345, at *11 (“evidence
19 of small circulation . . . or local air time without other proof of access is generally
20 not enough to demonstrate a reasonable possibility of access”); *McRae v. Smith*,
21 968 F. Supp. 559, 565 (D. Co. 1997) (performances in Colorado and Wyoming
22 insufficient to establish access where defendants were not in those States at the
23 time).

24 Plaintiffs’ allegation that the *Smoke and Mirrors* EP containing “Live Your
25 Life” charted at #2 on Billboard’s Reggae chart *for a single month* in April 2017
26 also is not probative of the *reach* of “Live Your Life.” All this alleged fact may
27 show is that the name of the album—and not the specific song “Live Your Life”—
28 appeared on a chart in a niche genre of music. Again, Plaintiffs have not alleged

1 that the writers of “Levitating” participate in the reggae genre. Thus, it is nothing
2 more than sheer speculation to assume that the “Levitating” writers saw the name
3 of Plaintiffs’ album on Billboard, sought the album out, and then listened to every
4 single song on the album, including “Live Your Life.”

5 **b. The Mere Availability Of “Live Your Life” On The**
6 **Internet Is Insufficient To Allege Widespread**
7 **Dissemination**

8 Plaintiffs’ allegations that “Live Your Life” was available to stream and/or
9 download on the Internet likewise fail to sufficiently plead access. Plaintiffs
10 vaguely allege that “Live Your Life” “appeared on a variety of streaming services”
11 and was “available online both via streaming and downloads” from 2017-2018.
12 FAC, ¶¶ 22, 23. Tellingly, however, Plaintiffs again fail to allege any facts as to
13 how many streams and/or downloads of “Live Your Life” took place during that
14 one-year period. Plaintiffs’ failure to plead any such facts is fatal to their claim.

15 Indeed, “[t]he availability of a copyrighted work on the Internet, in and of
16 itself, is insufficient to show access through widespread dissemination.” *Loomis*,
17 2013 WL 6044345, at *12; *Batts v. Adams*, 2011 WL 13217923, at *4 (C.D. Cal.
18 Feb. 8, 2011) (“[T]he posting of videos and/or songs on YouTube, Amazon.com,
19 and iTunes by an unknown singer . . . is hardly ‘widespread’ [dissemination] and,
20 in fact, is quite limited, and clearly insufficient to support a finding of access”).

21 Here, Plaintiffs have alleged nothing more than the “mere availability” of
22 “Live Your Life” online. Plaintiffs have provided zero facts as to the scope of the
23 alleged distribution of “Live Your Life” on the Internet. Such bare assertions of
24 internet presence are insufficient to plead widespread dissemination. *See, e.g.*,
25 *Clanton*, 556 F. Supp. 3d at 328 (granting motion to dismiss: “[a]s a matter of law,
26 the fact that the Subject Composition was posted on the internet is insufficient on
27 its own to show ‘wide dissemination.’ Were it otherwise, any work that any person
28 uploaded publicly to the internet would have to be considered sufficiently ‘widely

1 disseminated’ to give rise to an inference that every person had heard it—an
 2 inference that would be plainly unreasonable.”); *Minaj*, 2012 WL 12887393, at *5
 3 (“[T]he mere fact that the video was placed on YouTube does not establish it was
 4 disseminated widely.”) (granting motion to dismiss on access grounds); *Hayes v.*
 5 *Keyes*, 2014 WL 12586731, at *2 (C.D. Cal. Nov. 10, 2014) (“Plaintiffs’ sole
 6 allegation with regard to access is that the work was uploaded to YouTube in 2009.
 7 However, this does not imply it was disseminated widely, and the Complaint
 8 provides no facts to support such an inference.”) (granting motion to dismiss).

9 **2. Plaintiffs’ “Chain of Events” Allegations Also Fail To**
 10 **Sufficiently Allege Access**

11 The FAC also fails to plausibly allege access through a particular chain of
 12 events. The FAC merely alleges that (i) Defendant Coffee is a member of a
 13 production team that originated in Miami, Florida, which team produced *an*
 14 *entirely different song* on Dua Lipa’s album (*not* “Levitating”), entitled “Break
 15 My Heart” (FAC, ¶¶ 24-25), and (ii) one of the co-writers of “Break My Heart,”
 16 non-party Ali Tamposi, was taught guitar by Plaintiff Cope’s brother in law and is
 17 also connected to Cope on Facebook (where Cope posted unspecified news about
 18 Plaintiffs’ band) (*id.*, ¶ 26).

19 Plaintiffs’ tortured chain of events allegations are insufficient to raise a
 20 reasonable possibility that the writers of “Levitating” had access to “Live Your
 21 Life” prior to the creation of “Levitating.” They amount to nothing more than a
 22 speculative, attenuated theory based on numerous degrees of separation, none of
 23 which establish any link—let alone a concrete link—between the writers of
 24 “Levitating” and “Live Your Life.” Plaintiffs are essentially seeking to plead
 25 access by alleging that someone who knows someone who knows someone *might*
 26 have met one of the “Levitating” writers, without alleging how or whether any
 27 writer of “Levitating” became aware of “Live Your Life” through any such chain.
 28 Indeed, Plaintiffs do not even allege that Ms. Tamposi was familiar with “Live

1 Your Life”—let alone that she provided any writer of “Levitating” with an
 2 opportunity to hear it. *See, e.g., Ronk v. Hudson*, 2022 WL 3013214, at *7 (C.D.
 3 Cal. Feb. 23, 2022) (“Plaintiff fails to allege facts showing *each link in the chain*
 4 *of events* leading to [Defendants’] access”) (granting motion to dismiss for failure
 5 to plausibly plead chain of events). Simply put, these allegations fail to establish
 6 any nexus between the “Levitating” writers and “Live Your Life.” Plaintiffs’ chain
 7 of events allegations thus fail as a matter of law. *See, e.g., Star Fabrics, Inc.*, 2014
 8 WL 12591271, at *3-4 (“Because the Complaint fails to allege any *concrete facts*
 9 *specifically linking* The Wet Seal to the protected design, Star has not adequately
 10 alleged access by a chain of events.”); *Klauber Brothers*, 2018 WL 6984817, at *4
 11 (complaint lacked “specific factual support” for chain of events access theory and
 12 “fail[ed] to allege any concrete facts specifically linking Defendants’ activities to
 13 the Lace Designs”); *Minaj*, 2012 WL 12887393, at *3 (“[T]he pleadings fail to set
 14 forth any chain of events connecting the video to Minaj or Viacom. For instance,
 15 Plaintiff fails to explain how Minaj or Viacom would have known the video was
 16 available on YouTube”); *Art Attacks Ink*, 581 F.3d at 1143-44 (no chain of events
 17 where plaintiff proffered evidence that one of defendant’s decision-makers
 18 attended a county fair where plaintiff displayed its designs because there was no
 19 evidence the decision-maker saw the design or visited the fair during the relevant
 20 time period).

21 * * *

22 The FAC’s access allegations are wholly insufficient to plead access under
 23 either a widespread dissemination or chain of events theory. These allegations,
 24 even if true, could not even establish a “bare possibility” of access (which itself
 25 would be insufficient). They certainly do not give rise to the requisite *reasonable*
 26 inference that writers of “Levitating” had a *reasonable* opportunity to hear “Live
 27 Your Life” prior to creating “Levitating.” The FAC should be dismissed on this
 28 ground.

1 **B. Plaintiffs Fail To Adequately Allege Substantial Similarity**

2 The Ninth Circuit applies a “two-part test to determine whether the
3 defendant’s work is substantially similar to the plaintiff’s copyrighted work.”
4 *Skidmore*, 952 F.3d at 1064. “The first part, the extrinsic test, compares the
5 objective similarities of specific expressive elements in the two works,” while
6 “distinguish[ing] between the protected and unprotected material in a plaintiff’s
7 work.” *Id.* “The second part, the intrinsic test, ‘test[s] for similarity of expression
8 from the standpoint of the ordinary reasonable observer, with no expert
9 assistance.’” *Id.* At the pleading stage, only the extrinsic component is at issue.
10 *Basile v. Sony Pictures Entm’t, Inc.*, 2014 WL 12521344, at *3 (C.D. Cal. Aug. 1,
11 2014). As explained below, the FAC must be dismissed due to Plaintiffs’ failure to
12 properly allege substantial similarity.

13 Plaintiffs’ FAC contains zero factual identification of any materials from
14 “Live Your Life” that are allegedly infringed in “Levitating.” Courts consistently
15 recognize that where a plaintiff fails to allege substantial similarity between the
16 allegedly infringed work and the allegedly infringing work through non-conclusory
17 facts, he or she fails to state a claim for copyright infringement. Indeed, “the
18 extrinsic test demands more than listing elements in vague and conclusory fashion;
19 it requires a plaintiff to ‘compar[e] those elements for proof of copying.’” *Minaj*,
20 2012 WL 12887393, at *4 (granting motion to dismiss where “Plaintiff fail[ed] to
21 compare the elements, or constellation of elements, from the two works,” and thus,
22 “the Court ha[d] no factual basis to infer that the protected elements of the songs
23 [were] substantially similar under the extrinsic test.”).

24 Plaintiffs fail to plead the existence of *any protectable* similarities at all,
25 much less substantial ones, that exist between “Live Your Life” and “Levitating.”
26 Plaintiffs’ sole allegations regarding the purported similarities between the works
27 at issue are devoid of a shred of factual detail and are entirely conclusory in nature.
28 Indeed, Plaintiffs allege only that “‘Live Your Life’ and ‘Levitating’ are

1 substantially similar in their main melodic theme, supportive harmonies, and
2 accompaniment” and “are both set to minor keys and have similar tempos and
3 overall feel or style.” FAC, ¶¶ 27-28. No facts whatsoever are provided regarding
4 any alleged musical similarity. Indeed, use of the minor key and tempo are not
5 protectable, so those allegations are irrelevant to any substantial similarity analysis.
6 *Gray v. Hudson*, 28 F.4th 87, 98 (9th Cir. 2022) (“[N]o person may copyright the
7 minor scale, as such scales are common musical building blocks belonging to the
8 public”); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 548 (S.D.N.Y. 2000) (describing
9 tempo as “non-protectible musical element[]”).

10 Plaintiffs’ failure to allege how “Live Your Life” and “Levitating” are in any
11 way substantially similar in protectable expression is fatal to Plaintiffs’
12 infringement claim. *See, e.g., Shaheed-Edwards*, 2017 WL 6403091, at *3
13 (“Plaintiffs’ allegations that the chorus, concept, and cadence of the two songs are
14 similar are merely conclusory and cannot be sustained without more specificity.
15 Accordingly, Plaintiffs have failed to state a claim for copyright infringement
16 based on substantial similarity between the two works.”); *McCoy-Harris*, 2019 WL
17 1002512, at *3 (“conclusory statement” that “*Finding Boaz* contains ‘portions’ of
18 [plaintiff’s] screenplays ... do[es] not satisfy *Iqbal*’s pleading standard” where
19 “Plaintiff makes no effort to compare the copyrightable elements of *Finding Boaz*
20 with either of the Works”); *Evans v. NBCUniversal Media, LLC*, 2021 WL
21 4513624, at *5 (C.D. Cal. July 23, 2021) (allegations that “film copied numerous
22 copyrightable elements of Plaintiff’s work” including “the title and medium of the
23 screenplay, dialogue, structure, themes, choices of shots, camera, angles, colors,
24 lighting, textual descriptors, and other artistic and expressive elements of
25 Plaintiff’s work” were “conclusory allegations [that] do not satisfy *Iqbal*’s
26 pleading standards”).⁶

27 _____
28 ⁶ *See also Hines v. Roc-A-Fella Recs., LLC*, 2020 WL 1888832, at *4 (S.D.N.Y.
Apr. 16, 2020) (“The complaint in this case entirely fails to identify which

1 Pleading requirements exist for a reason. Defendants are entitled to be
 2 apprised of specific allegations of the protectable expression that is allegedly
 3 infringed by their work. Without such a requirement, infringement claims would
 4 become moving targets, with copyright plaintiffs vaguely alleging similarities at
 5 the pleading stage with leeway to change and shift their theory as they please in
 6 discovery. *See Martinez v. McGraw*, 2010 WL 1493846, at *6 (M.D. Tenn. Apr.
 7 14, 2010) (“[W]hen a party fails to delineate the basis upon which a plaintiff
 8 claims two works are ‘substantially similar,’ it is ‘impossible for Defendants to
 9 answer or defend against Plaintiff’s claim,’ and Plaintiff’s claim must be
 10 dismissed.”). The need for a clear understanding of what is alleged to be infringed
 11 at the pleadings stage has only been further underscored by the Ninth Circuit’s
 12 recent seminal decisions in *Skidmore v. Led Zeppelin* and *Gray v. Hudson*, which
 13 reinforced that similarities based on the common use of basic musical building
 14 blocks, either alone or in combination, are not actionable. *See Skidmore*, 952 F.3d
 15 at 1069 (“Nor does copyright extend to ‘common or trite’ musical elements . . . or
 16 ‘commonplace elements that are firmly rooted in the genre’s tradition,’ . . . These
 17 building blocks belong in the public domain and cannot be exclusively
 18 appropriated by any particular author.”); *Gray*, 28 F.4th at 101-102 (“[T]he portion
 19 of the Joyful Noise ostinato that overlaps with the Dark Horse ostinato consists of
 20 a manifestly conventional arrangement of musical building blocks . . . both employ
 21 the pitch progression 3-3-3-3-2-2 played in a completely flat rhythm. This

22

23 elements of ‘Help Me’ were infringed or which elements of ‘Paper Chase’ and
 24 ‘Toe 2 Toe’ are infringing. The complaint contains only broad allegations of
 25 similarity. These ‘vague and general allegations of similarity’ do not suffice.”);
 26 *Broughel v. Battery Conservancy*, 2010 WL 1028171, at *2 (S.D.N.Y. 2010)
 27 (plaintiff denied leave to re-assert copyright infringement where plaintiff did not
 28 “articulate with any specificity . . . what aspect of any images used by the
 defendant make them legally similar to her own copyrighted works.”); *Perry v.
 Mary Ann Liebert, Inc.*, 2018 WL 2561029, at *5 (S.D.N.Y. June 4, 2018)
 (“Plaintiff’s copyright infringement claim is dismissed for failure to plausibly
 plead which aspect of the Pierce Article infringed a protectable aspect of her
 Dissertation and how those aspects are substantially similar.”).

