

1 Robert S. Besser SBN 46541
LAW OFFICES OF ROBERT S. BESSER
2 100 Wilshire Blvd., Suite 700
Santa Monica, California 90401
3 Tel: (310) 394-6611
Fax: (310) 394-6613
4 rsbesser@aol.com

5 Stewart L. Levy NY State Bar No. 1143536
EISENBERG, HEFLER & LEVY, LLP
6 335 Madison Avenue, 9th Floor
New York, New York 10017
7 Tel: (212) 599-0777
Fax: (212) 599-0770
8 slevy@ehllaw.com
Admitted *Pro Hac Vice*

9 Attorneys for Plaintiffs
10 CHRISTOPHER EDWARD COPE,
CHRISTOPHER EDWARD MONTAGUE,
11 FABIAN ANDRES ACUNA, ADAM
SPENCER KAMPF and DENTON BEDWARD

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
14 WESTERN DIVISION
15

16 CHRISTOPHER EDWARD COPE,
CHRISTOPHER EDWARD MONTAGUE,
17 FABIAN ANDRES ACUNA, ADAM
SPENCER KAMPF and DENTON
18 BEDWARD,

19 Plaintiffs,

20 vs.

21 WARNER RECORDS, INC., a Delaware
corporation, DUA LIPA, an individual, BOSCO
KANTE, an individual, CLARENCE
22 COFFEE, JR., an individual, SARAH HUDSON,
an individual, STEPHEN KOZMENIUK,
23 an individual and DOES 1 through 10,

24 Defendants.

Case No. 2:22CV01384 SSS (AS)

MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION
TO MOTION TO DISMISS;
DECLARATION OF STEWART L.
LEVY IN SUPPORT OF OPPOSITION
Filed Concurrently Herewith

Date: March 17, 2023
Time: 2:00 p.m.
Ctrm.: 2

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. PRELIMINARY STATEMENT 5

II. ARGUMENT 6

 A. Motions to Dismiss Are Disfavored in Copyright Infringement Cases 6

 B. Substantial Similarity is Not Only Adequately Pled in the Amended
 Complaint Has Been Disclosed in Detail to Defendants 7

 C. Access Exists and in the Alternative, a Decision on Access on a Motion
 to Dismiss is Premature10

 1. Existence fo Wide Dissemination of Allegedly Infringed
 Work Requires Discovery11

 2. Chain of access has been sufficiently established to defeat
 a Motion to Dismiss 13

III. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

1

2

3 *Art Attacks Ink, LLC v. MGA Entm’t*,
581 F. 3d 1138 (9th Cir. 2009) 16

4

5 *Ashcroft v. Iqbal*,
556 U.S. 662 (2009) 7

6 *Bell Atl. Corp. v. Twombly*,
550 U.S. 544 (2007) 7

7

8 *Cavalier v. Random House, Inc.*,
297 F. 3d 815, 822 (9th Cir. 2002) 6

9 *DuMond v. Reilly*,
2021 U.S. Dist. LEXIS 37241 (C.D. Ca. January 14, 2021) 10

10

11 *In re My Ford Touch Consumer Litig.*,
46 F. Supp.3d 936, 976 (N. Dist. Ca 2014)..... 9

12 *Lois v. Levin*,
2022 U.S. Dist. LEXIS 168358 (C.D. Ca September 16, 2022)..... 7

13

14 *Loomis v. Cornish*,
836 F.3d 991 (9th Cir. 2016)..... 11

15 *Manzarek v. St. Paul Fire & Marine Ins. Co.*,
519 F.3d 1025, 1031 (9th Cir. 2008)..... 16

16

17 *Marder v. Lopez*,
450 F.3d 445 (9th Cir. 2016)10

18 *Mendiondo v. Centinela Hosp. Med. Ctr.*,
521 F.3d 1097 (9th Cir. 2008) 7

19

20 *Segal v. Segel*,
2022 U.S. Dist. Lexis 11832 (S.D. Ca January 21, 2022) 7

21 *Skidmore v. Led Zeppelin*,
952 F.3d 1051 (9th Cir, 2020)..... 12

22

23 *Star Fabrics, Inc. v West Seal, Inc.*,
2014 U.S. Dist. LEXIS 20052 (9th Cir. December 2, 2014)..... 16

24 *Three Boy Music Corp. v. Bolton*,
212 F.3d 477 (9th Cir. 2000)..... 11

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(Continued)

Warren v. Fox Family Worldwide, Inc.
328 F.3d 1136 (9th Cir. 2003)10

Zindel v. Fox Searchlight Pictures, Inc.,
815 F. App’x 158 (2020)..... 6

Other Authorities

Federal Rule of Civil Procedure 8(a)(2) 9

Federal Rule of Civil Procedure 12(b)(6) 10

1 Plaintiffs submit this memorandum in answer and in opposition to the motion by
2 Defendants seeking an order dismissing the amended complaint. Defendants' motion is
3 not only premature, but their recitation of the law as applied to the undisputed facts is
4 incorrect.

5 I. PRELIMINARY STATEMENT

6 Plaintiffs' amended complaint alleges that defendants, the singer and
7 performer, Dua Lipa, and various other individuals, infringed Plaintiffs' copyrighted
8 musical composition, "Live Your Life," in writing a song entitled, "Levitating." The
9 amended complaint explains that Plaintiffs are members of a professional band based in
10 Delray Beach, Florida who have performed for over a decade under the name Artikal
11 Sound System and who composed "Live Your Life" approximately eighteen months
12 before Defendant Dua Lipa has admitted the infringing work, "Levitating," was written.

13 Plaintiffs' album which contained their performance of "Live Your Life," charted
14 on the *Billboard* magazine chart, the group's performance of their recording of the song
15 was sold both via the internet, and through retail, and the group performed their song at
16 numerous concerts. All these elements establish access sufficient to reject a motion to
17 dismiss, but are made even more compelling by the Delray Beach connection.
18 Specifically, a writer who collaborates in writing songs with at least one of the
19 Defendants, and who admittedly worked on a song on the album on which Dua Lipa's
20 infringing song, "Levitating," appears, not only grew up in Delray Beach, but was
21 mentored as a musician and writer by the brother-in-law of plaintiff Chris Cope (the latter
22 who remains a Facebook friend) (*see* paragraphs 17-26 of the amended complaint).

23 As for the substantial similarity between "Live Your Life," and "Levitating," the
24 amended complaint notes the two songs share melodic themes, harmonies,
25 accompaniment performance in minor key and have similar tempos and overall feel or
26

1 style. (*see* paragraphs 27-30) Defendants maintain that these allegations of substantial
2 similarity are too generic to support a complaint or to assist them in preparing their
3 defense. Significantly, however, Defendants have failed to inform the Court that on three
4 (3) occasions Plaintiffs' counsel submitted to Defendants' prior attorneys a twelve page
5 report prepared by a respected musicologist setting forth in detail the substantial
6 similarities between the two songs. A copy of that report, together with correspondence
7 from Defendants' attorney prior to their current counsel, indicating receipt of the report,
8 are attached to the accompanying declaration of Stewart L. Levy. The existence of this
9 musicologist's report and its submission to prior counsel for Defendants makes, at best,
10 disingenuous any argument that substantial similarity has not been sufficiently alleged at
11 this stage of the litigation.

12 II. ARGUMENT

13 A. Motions to Dismiss Are Disfavored in Copyright Infringement Cases

14 The two elements of a copyright infringement case are access and substantial
15 similarity. *Cavalier v. Random House, Inc.* 297 F. 3d 815, 822 (9th Cir. 2002). Both
16 elements tend to be factual in nature and, hence, the province of the trier of fact. There is,
17 therefore, a strong presumption by the courts to reject motions to dismiss infringement
18 cases as being premature. In *Zindel v. Fox Searchlight Pictures, Inc.*, 815 F. App'x 158
19 (2020) the Ninth Circuit instructed district courts to be "cautious" before dismissing
20 complaints for lacking allegations of substantial similarity. *Id.* at 159. The Court
21 explained that a dismissal motion is warranted only if, "as a matter of law" the similarities
22 between "works are only in uncopyrightable material or are *de minimus*."

23

24

25

26

27

28

1 The same reasoning applies to motions to dismiss based on lack of access. In such
2 cases “the court’s task is ... to assess the legal feasibility of the complaint.... Not to
3 assess the weight of the evidence.” *Segal v. Segel*, 2022 U.S. Dist. LEXIS 11832 *25
4 (S.D. Ca. January 21, 2022)

5 In considering a motion to dismiss, a court not only evaluates the elements of the
6 complaint, but also the context in which the allegations are made. In cases such as *Bell*
7 *Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (involving allegations of antitrust conspiracy
8 in the telecommunications industry) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)
9 (involving complaints of a Pakistani national involved in the 9/11 attack) the Supreme
10 Court dismissed complaints, noting that the complexity of the allegations and the cost of
11 extensive discovery justified dismissal of the litigations. In cases of lesser national
12 import and/or where discovery will not be so extensive, however, the courts have been
13 more lenient in permitting an action to continue. See, e.g., *Mendiondo v. Centinela Hosp.*
14 *Med. Ctr.*, 521 F.3d 1097, 1104. (9th Cir. 2008) (denying a motion to dismiss a complaint
15 by a whistleblower against her hospital employer even though complaint was “inartfully
16 drawn”); *Lois v. Levin*, 2022 U.S. Dist. LEXIS 168358 (C.D. Ca September 16, 2022)
17 (denying motion to dismiss a copyright infringement suit finding that under the a ”theory
18 of striking similarity” the court could infer the similarity between the works and that at
19 the early stage of the case the plaintiff need only make a plausible claim of striking
20 similarity.)

21 B. Substantial Similarity Is Not Only Adequately Pled in the Amended
22 Complaint, but an Expert Musicologist’s Report Has Been Disclosed in Detail to
23 Defendants

24 Defendants argue that the amended complaint lacks sufficient allegations of
25 substantial similarity between “Live Your Life” and “Levitating” to warrant the dismissal
26

1 of the action. Their position is puzzling in light of the fact that Defendants have for nearly
2 a year had access to a musicologist report setting forth in detail the similarities between
3 the two compositions, and reaching the conclusion, as set forth in paragraph 30 of the
4 amended complaint, that the “degree of similarity” between the two compositions makes
5 it “highly unlikely that “Levitating” was created independently from “Live Your Life.”

6 As explained in the accompanying declaration of Stewart L. Levy, to which the
7 report is attached, Mr. Levy sent the report on three occasions to attorneys for
8 Defendants, two times prior to the filing of the lawsuit and the third time a few weeks
9 after the complaint had been filed and Plaintiffs’ counsel was made aware of which
10 attorney would be representing Defendants. Initially, Mr. Levy sent a letter dated
11 December 2, 2021, to Julian Petty, the executive vice president and head of business and
12 legal affairs of Defendant Warner Records, to which the musicologist report was
13 attached. When Mr. Petty failed to respond to the letter (which was both mailed, certified,
14 return receipt requested, and emailed) Mr. Levy again sent the letter and attached report
15 to Mr. Petty, this time dating the letter January 7, 2022. When this second letter elicited
16 no response, Mr. Levy in March, 2022 engaged in a series of conversations with Robert
17 Meloni, an attorney who represented that he acted as litigation counsel for Dua Lipa and
18 who, over the course of a few days that month, confirmed that he would be representing
19 all Defendants in this action. Copies of the musicologist report and the correspondence
20 with Mr. Meloni are attached to Mr. Levy’s accompanying declaration.

21 This correspondence together with the attached musicologist’s report provided
22 ample details of the allegations of the substantial similarities between the two songs and
23 made it unnecessary to repeat them verbatim in the amended complaint other than
24 referring to the report’s findings and transcriptions in paragraphs 28, 29 and 30 of the
25 amended complaint. Having sent the musicologist’s report to Mr. Petty twice and Mr.

1 Meloni once and confirming with Mr. Meloni that he had received the report, it seemed
2 superfluous to provide in the amended complaint greater specifics concerning substantial
3 similarity. “The primary purpose of Rule 8(a)(2) [providing for a ‘short and plain
4 statement of the claim’] is to ensure the pleading gives a defendant ‘fair notice of what
5 plaintiff’s claim is and the grounds upon which it rests in order to enable the [defendant]
6 to answer and prepare for trial, and to identify he nature of the case.” *Segal, supra* *13.
7 Sometimes, as in this case, pre-suit notice serves the same purpose as notice provided in a
8 complaint. See, e.g., *In re My Ford Touch Consumer Litig.*, 46 F. Supp.3d 936, 976 (N.
9 Dist. Ca 2014).

10 The report, prepared by Alexander Stewart, a Professor of Music at the University
11 of Vermont, analyzes in detail similarities in key, tempo, harmony, melodies, signature
12 themes and structures, divides both musical compositions into parcels of a few seconds
13 each, identifies the similarities in the various parcels, and also presents its findings in
14 musical transcriptions and bars indicating notes played by electric guitar and vocalist,
15 together with similarities in harmonic rhythm and accompaniment. Professor Stewart
16 concludes his report by stating the following:

17 “The musical expression at issue in this case is substantially
18 similar and is significant both quantitatively and qualitatively
19 to each song. These signature phrases are distinctive and a
20 prior art search has uncovered no other songs similar to
21 these songs as they are to each other. ...I consider it highly
22 unlikely that LVT (“Levitating”) was created independently
23 from LYL (“Live Your Life”).

1 The Defendants should not and cannot keep from the Court the existence of
2 Professor Stewart's report by claiming that extrinsic evidence is not properly reviewed on
3 motions to dismiss. On the contrary, the District Court noted in *DuMond v. Reilly*, 2021
4 U.S. Dist. LEXIS 37241 (C.D. Ca. January 14, 2021) that "[w]hile a court must generally
5 refrain from considering extrinsic evidence in deciding a 12(b)(6) motion, it may ...
6 consider documents on which the complaint 'necessarily relies', and whose 'authenticity
7 is not contested.'" *Id.* at *4.(quoting *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d
8 1136, 1141 n. 5 (9th Cir. 2003). *See also Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.
9 2006) ("A court may consider evidence on which the complaint 'necessarily relies' if: (1)
10 the complaint refers to the document; (2) the document is central to the plaintiff's claim;
11 and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.").

12 Quite apart from the striking similarity between the two works sufficiently alleged
13 in the complaint when the contents of Professor Stewart's report are considered,
14 allegations of substantial similarity between the two compositions extend beyond
15 uncopyrightable material or being just *de minimus* (see *Zindel, supra*). Dismissal of the
16 action on a Rule 12(b)(6) motion, prior to any discovery being undertaken, is therefore
17 improper, and a motion seeking such relief should be denied.

18 C. Access Exists And, in the Alternative, Decision on Access on a Motion to
19 Dismiss Is Premature

20 Defendants misinterpret and/or overreach in arguing that a dismissal of the action
21 is appropriate due to the amended complaint's alleged failure to adequately allege
22 Defendants' access to Plaintiffs' musical composition. Defendants erroneously conflate
23 the two recognized theories of access - chain of access and wide dissemination. "When
24 there is 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

1 defendants' access or (2) showing that the plaintiff's work has been widely
2 disseminated." *Three Boy Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000).

3 1. Existence of wide dissemination of allegedly infringed work requires
4 discovery

5 "Wide dissemination" exists when allegations "enable a court to infer plausibly
6 that the alleged protected works reached an audience sufficiently large and diverse to
7 render reasonable the possibility the alleged infringer himself is among the audience."
8 *Segal, Id* at 11832, *19. While in *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016) the
9 Ninth Circuit suggested that widespread dissemination usually involves "a work's
10 commercial success," the Ninth Circuit did not identify a specific amount of commercial
11 success or what constitutes such success, leaving open to discussion in this case whether
12 Plaintiffs' successful career as a professional band meets the requirement of wide
13 dissemination. Significantly, in *Three Box Music Corp., supra*, the Ninth Circuit affirmed
14 a jury verdict against the singer Michael Bolton for copyright infringement where access
15 was far less than pled by Plaintiffs here.

16 The Ninth Circuit's decision in *Bolton*, a case in which Defendants' counsel
17 represented Bolton, is especially relevant. In that case, Bolton, a popular singer and
18 entertainer, was accused of infringing upon a song recorded by the group, The Isley
19 Brothers, twenty-five years before Bolton had written his song. The Isley Brothers' song,
20 initially released only as a 45-rpm single, never charted even once in a music magazine's
21 Top 100, and first appeared on a long-playing album a year after Bolton wrote his song.
22 Bolton was not alleged to have had direct access to the Isley Brothers' song.
23 Nevertheless, the jury found for the Isley Brothers and the Ninth Circuit affirmed the
24 jury's decision. In so doing the Court of Appeals quoted approvingly the reasoning in
25 *Nimmer* which cautions that "concrete cases will pose difficult judgments as to where
26

1 along the access spectrum a given exploitation falls... At times, distinguishing a “bare”
2 possibility from a ‘reasonable’ possibility will present a close question.” *Id.* at 482. The
3 need to carefully evaluate an infringement claim instead of quickly dismissing it is also
4 evidenced in *Loomis*. The Court of Appeals in that case affirmed a district court’s
5 summary judgment dismissal of a copyright infringement case, but only after plaintiffs
6 had been afforded discovery to establish their access and substantial similarity arguments
7 and had failed to meet their evidentiary burden. *Loomis* is not the only case relied upon by
8 Defendants to support their dismissal motion which, in fact, presented instances where
9 plaintiffs’ allegations were dismissed only **after** discovery had been had or a case tried to
10 a jury. *See, e.g., Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir, 2020) (affirmed jury’s
11 decision finding no copyright infringement involving the song, “Stairway to Heaven”);
12 *Art Attacks Ink, LLC v. MGA Entm’t*, 581 F. 3d 1138 (9th Cir. 2009) (affirmed district
13 court’s decision on a summary judgment made after a jury verdict concerning alleged
14 infringement involving Bratz Dolls) These cases involved decisions which came after
15 plaintiffs had had discovery opportunities to gather evidence of widespread
16 dissemination.

17 That is not the case here where Defendants seek to deny Plaintiffs their right to
18 discovery. Defendants attempt to do so even though the following facts, set forth in the
19 amended complaint (“FAC”), require discovery to ascertain details of the extent of the
20 widespread dissemination of Plaintiff’s musical composition, “Live Your Life.”

21 A. Artikal has been a popular band, largely in the Florida region, for
22 about a dozen years. FAC ¶17.

23 B. During the period in question, March 31, 2017, when the
24 band’s *Smoke and Mirrors* album was released, and August 28, 2018, when Dua Lipa
25 admits to having written “Levitating”, the band played mainly in small venues, principally
26

1 in Florida. (FAC ¶18.

2 C. In April 2017 “Live Your Life,” from the *Smoke and Mirrors* album
3 charted on Billboard’s Reggae chart at #2. FAC ¶19.

4 D. Within the reggae music community *Smoke and Mirrors* garnered
5 coverage which extended to the birthplace of reggae, Jamaica, where it is mentioned in
6 one of that nation’s leading newspapers. FAC ¶20.

7 E. Beginning in April 2018 “Live Your Life” was significantly used in
8 a video commercial for Delray Beach, Florida’s “Beerfest 2018,” which promoted tours
9 of local bars and restaurants. FAC ¶ 21

10 F. From its 2017 release, “Live Your Life” and the album in which it
11 appears, *Smoke and Mirrors*, until Artikal stopped the album’s sale in the late fall, 2018,
12 the group played the song at its concerts and recordings were available online both via
13 streaming and downloads, while the group sold on its own approximately 500 physical
14 copies. (In October 2018 the group asked that the album be taken off on-line sites because
15 the group had a new lead singer and, as a result, was changing its repertoire to reflect the
16 strengths of the new singer.) FAC ¶23.

17 Given the above facts, the extent to which Plaintiffs have pled the dissemination of
18 their recording of “Life Your Life” is sufficient to defeat a motion to dismiss.

19 2. Chain of access has been sufficiently established to defeat a motion
20 to dismiss

21 In *Segal, supra*, the District Court denied defendants’ motion to dismiss a
22 copyright infringement claim against them, finding that chain of access existed merely by
23 plaintiff having sent her screenplay to thirteen talent agents at the William Morris Agency
24 (WMA”), even though those agents did not represent the defendants (other agents at
25 WMA represented the defendants) and there was no evidence that any of the thirteen

26

27

28

1 agents had discussed plaintiff’s screenplay with defendants or their agents at the
2 company. The District Court reasoned that “[p]laintiff is entitled to the presumption of
3 truth that the intermediaries received her message and that the intermediaries used their
4 relevant connection as employees of WMA to transmit Plaintiff’s protected works to
5 [defendants]... and/or their agents.” The Court went on to explain that whether plaintiff’s
6 screenplay actually was seen by defendants, or their agents were facts which “reside
7 exclusively within the files of Defendants and/or WMA and, thus, Plaintiff is not
8 expected to have knowledge of them prior to discovery.” *Id* at *27-28.

9 The facts supporting chain of access in this case are much stronger than those
10 presented in *Segal*. The amended complaint this action alleges that:

- 11 1. Artikal Sound System is based in Florida. FAC ¶17.
- 12 2. Clarence Coffee, Jr., one of the defendants and a co-writer of “Levitating,”
13 is a member of a production team known as Monsters and Strangerz. FAC ¶ 24.
- 14 3. Monsters and Strangerz produced a song which appears on Dua Lipa’s
15 album, *Future Nostalgia* – “Break My Heart.” FAC ¶ 25
- 16 4. “Break My Heart” was co-written by Ali Tamposi, a prominent songwriter
17 FAC ¶26.
- 18 5. Co-writer credit on “Break My Heart,” was given to two members of the
19 popular 1980s group, INXS, Andrew Farriss and Michael Hutchence, because “Break My
20 Heart” is strikingly similar to, and derivative of, the guitar riff in INXS’ 1987 hit, “Need
21 You Tonight.” FAC ¶ 25.
- 22 6. Upon information and belief, Monsters and Strangerz originated in Miami,
23 Florida. FAC ¶ 24.
- 24 7. Ali Tamposi not only shares a Florida connection, but she was taught guitar
25 by plaintiff Chris Cope’s brother-in-law. FAC ¶26

1 8. Plaintiff Chris Cope has for years been a Facebook friend. of Tamposi’s.
2 FAC ¶ 26.

3 9. Cope has regularly posted news about Artikal Sound Systems on his
4 Facebook page. FAC ¶26.

5 The Court in *Segal*, quoting *Loomis*, 836 F.3d at 995 noted that “a plausible
6 inference ‘that a third party with whom both the plaintiff and defendant were dealing had
7 possession of plaintiff’s work[s] is sufficient to establish access by the defendant[s].” *Id*
8 at *23. In *Segal*, the simple fact that the allegedly infringed work had been given to
9 agents at WMA, a talent agency which represented defendants, adequately alleged that
10 “defendants had a reasonable opportunity to view plaintiff’s screenplay and treatment
11 prior to the creation of [defendant’s alleging infringing] book sufficed to defeat a motion
12 to dismiss. *Id.* *28. That is certainly the case here where plausible inference of
13 Defendants’ access to Plaintiffs’ “Live Your Life” can be made not only through Ms.
14 Tamposi, but based upon the Florida roots of Plaintiffs and one of the co-writers of
15 “Levitating,” Clarence Coffee, Jr., and his production team which produced the Dua Lipa
16 recording of that song.

17
18
19
20
21
22
23
24
25
26
27
28

1 III. CONCLUSION

2 For the reasons set forth above, Plaintiffs have established sufficient allegations of
3 access and substantial similarity to defeat a motion to dismiss their infringement claim. In
4 the event Defendants’ motion is granted, request is hereby made for leave to file a second
5 amended complaint. *See Star Fabrics, Inc. v West Seal, Inc.*, 2014 U.S. Dist, LEXIS
6 20052, *3 (9TH Cir. December 2, 2014) “When a district court grants a motion to dismiss,
7 it should provide leave to amend unless it is clear that the complaint could not be saved
8 by any amendment.” Citing *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025,
9 1031 (9th Cir. 2008).

10 Dated: January 19, 2023

11 Respectfully submitted,

12 EISENBERG, HEFLER & LEVY, LLP

13 By: s/ Stewart L. Levy
14 STEWART L. LEVY
15 Attorneys for Plaintiffs
16
17
18
19
20
21
22
23
24
25
26