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10 PATTON individually and d/b/a  
HADDINGTON MUSIC, STAR TRAK  
11 ENTERTAINMENT, GEFLEN  
RECORDS, INTERSCOPE RECORDS,  
12 UMG RECORDINGS, INC., and  
UNIVERSAL MUSIC DISTRIBUTION

13 UNITED STATES DISTRICT COURT

14 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

15 PHARRELL WILLIAMS, an  
individual; ROBIN THICKE, an  
16 individual; and CLIFFORD HARRIS,  
JR., an individual,

17 Plaintiffs,

18 vs.

19 BRIDGEPORT MUSIC, INC., a  
20 Michigan corporation; FRANKIE  
CHRISTIAN GAYE, an individual;  
21 MARVIN GAYE III, an individual;  
22 NONA MARVISA GAYE, an  
individual; and DOES 1 through 10,  
inclusive,

23 Defendants.

CASE NO. CV13-06004-JAK (AGR<sub>x</sub>)  
Hon. John A. Kronstadt, Ctrm 750

**PLAINTIFFS AND COUNTER-  
DEFENDANTS' NOTICE OF  
MOTION AND MOTION FOR  
SUMMARY JUDGMENT OR, IN  
THE ALTERNATIVE, PARTIAL  
SUMMARY JUDGMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: October 20, 2014  
Time: 8:30 a.m.  
Ctrm: 750

Action Commenced: August 15, 2013  
Trial Date: February 10, 2015

24 AND RELATED COUNTERCLAIMS.

26 ///

27 ///

1 TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF  
2 RECORD:

3 PLEASE TAKE NOTICE that, on **October 20, 2014 at 8:30 a.m.**, or as soon  
4 thereafter as the matter may be heard in Courtroom 750 of the above-entitled court,  
5 located at 255 East Temple Street, Los Angeles, California 90012, Plaintiffs and  
6 Counter-Defendants PHARRELL WILLIAMS, ROBIN THICKE (individually and  
7 d/b/a I LIKE ‘EM THICKE MUSIC), and CLIFFORD HARRIS, JR. and Counter-  
8 Defendants MORE WATER FROM NAZARETH PUBLISHING, INC., PAULA  
9 MAXINE PATTON individually and d/b/a HADDINGTON MUSIC, STAR TRAK  
10 ENTERTAINMENT, GEFFEN RECORDS, INTERSCOPE RECORDS, UMG  
11 RECORDINGS, INC., and UNIVERSAL MUSIC DISTRIBUTION (collectively,  
12 “Counter-Defendants”) will and hereby do move for summary judgment or, in the  
13 alternative, partial summary judgment, or, in the alternative, for an order treating  
14 specified facts as established pursuant to Fed.R.Civ.P. 56 on the grounds that there  
15 is no genuine dispute as to any material fact and movant is entitled to judgment as a  
16 matter of law, as follows:

17 1. Plaintiffs PHARRELL WILLIAMS, ROBIN THICKE, and  
18 CLIFFORD HARRIS (“Plaintiffs”) are entitled to judgment in their favor and  
19 against Defendants and Counter-Claimants FRANKIE CHRISTIAN GAYE, NONA  
20 MARVISA GAYE, and MARVIN GAYE III (“Defendants”) on Plaintiffs’  
21 Complaint for Declaratory Relief, including without limitation to a judgment  
22 declaring that Plaintiffs’ composition and sound recording, “Blurred Lines,” does  
23 not infringe the copyright in the Marvin Gaye composition, “Got to Give It Up  
24 (Part 1 and Part 2),” including as registered with the United States Copyright Office  
25 as Registration No. EP 366-530 and RE 910-939, and that the composition and  
26 sound recording, “Love After War,” written by Robin Thicke and Counter-  
27 Defendant Paula Maxine Patton and recorded by Robin Thicke, does not infringe the  
28 copyright in the Marvin Gaye composition, “After the Dance,” including as

1 registered with the United States Copyright Office as Registration No. EP 351-582,  
2 PA 002-617, and RE 903-945;

3       2. Counter-Defendants PHARRELL WILLIAMS, ROBIN THICKE  
4 (individually and d/b/a I LIKE ‘EM THICKE MUSIC), and CLIFFORD HARRIS,  
5 JR., MORE WATER FROM NAZARETH PUBLISHING, INC., STAR TRAK  
6 ENTERTAINMENT, INTERSCOPE RECORDS, UMG RECORDINGS, INC., and  
7 UNIVERSAL MUSIC DISTRIBUTION (the “Blurred Lines Counter-Defendants”)  
8 are entitled to judgment in their favor on Count 1 of Defendants’ Frankie Christian  
9 Gaye and Nona Marvisa Gaye Counterclaims and on the First Cause of Action of  
10 Defendant Marvin Gaye III’s Counterclaim; and,

11       3. Counter-Defendants ROBIN THICKE (individually and d/b/a I LIKE  
12 ‘EM THICKE MUSIC), PAULA MAXINE PATTON individually and d/b/a  
13 HADDINGTON MUSIC, STAR TRAK ENTERTAINMENT, GEFLEN  
14 RECORDS, UMG RECORDINGS, INC., and UNIVERSAL MUSIC  
15 DISTRIBUTION (the “Love After War Counter-Defendants”) are entitled to  
16 judgment in their favor on Count 2 of Defendants’ Frankie Christian Gaye and Nona  
17 Marvisa Gaye Counterclaims and on the Second Cause of Action of Defendant  
18 Marvin Gaye III’s Counterclaim.

19       The grounds for this Motion are that there are no genuine disputes as to any  
20 material facts, and that as a matter of law: (a) with respect to Plaintiffs’ Complaint  
21 and Count 1/First Cause of Action of Defendants’ Counterclaims, the composition  
22 and sound recording “Blurred Lines” does not copy any protected elements of the  
23 Marvin Gaye composition, “Got to Give It Up,” including that the two songs are not  
24 substantially similar, and any alleged similarities are *de minimis*; and (b) with  
25 respect to Count 2/Second Cause of Action of Defendants’ Counterclaims, the  
26 composition and sound recording “Love After War” does not copy any protected  
27 elements of the Marvin Gaye composition, “After the Dance,” including that the two  
28 songs are not substantially similar, and any alleged similarities are *de minimis*.

1 This motion is made following a conference of counsel pursuant to Local  
2 Rule 7-3 which was held on June 19, 2014.

3 The motion will be based on this Notice of Motion and Motion, the  
4 accompanying Memorandum of Points and Authorities, the Evidence in Support of  
5 the Motion, including the Declarations of Sandy Wilbur, Donna Stockett, and Seth  
6 Miller and exhibits thereto, the Statement of Uncontroverted Facts and Conclusions  
7 of Law, Notice of Lodging Music CD, and [Proposed] Judgment filed concurrently  
8 herewith, the Court's files and records in this action, and such other evidence,  
9 argument, or other matter as may be presented prior to or at the hearing on the  
10 Motion.

11  
12 DATED: July 21, 2014

KING, HOLMES, PATERNO &  
BERLINER, LLP

13  
14  
15 By: \_\_\_\_\_



HOWARD E. KING  
SETH MILLER

16  
17 Attorneys for Plaintiffs and Counter-Defendants  
18 PHARRELL WILLIAMS, ROBIN THICKE  
19 and CLIFFORD HARRIS, JR. and Counter-  
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22 MAXINE PATTON individually and d/b/a  
23 HADDINGTON MUSIC, STAR TRAK  
24 ENTERTAINMENT, GEFFEN RECORDS,  
25 INTERSCOPE RECORDS, UMG  
26 RECORDINGS, INC., and UNIVERSAL  
27 MUSIC DISTRIBUTION  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 This is an action arising out of alleged copyright infringement.

5 Plaintiffs Pharrell Williams, Robin Thicke, and Clifford Harris, Jr.  
6 (“Plaintiffs”) are the composers of the hit song, “Blurred Lines.”

7 Defendants Frankie Christian Gaye, Nona Marvisa Gaye, and Marvin Gaye  
8 III (“Defendants”) are the heirs of the deceased musical artist, Marvin Gaye.

9 Defendants claim that “Blurred Lines” infringes their copyright in the Marvin  
10 Gaye song, “Got to Give It Up.” In August 2013, Plaintiffs filed this action for  
11 declaratory relief seeking a judgment declaring that “Blurred Lines” does not  
12 infringe “Got to Give It Up.” In October 2013, Defendants filed counter-claims for  
13 copyright infringement alleging that: (a) “Blurred Lines” infringes “Got to Give It  
14 Up;” and (b) that a second song written by Plaintiff Robin Thicke and Paula Patton,  
15 “Love After War,” infringes the Marvin Gaye song, “After the Dance.” Defendants  
16 counter-sued Plaintiffs, Ms. Patton, and their record company and affiliated entities.

17 Plaintiffs and Counter-Defendants now move for summary judgment on both  
18 claims of copyright infringement. “Blurred Lines” and “Love After War” are not  
19 substantially similar to “Got to Give It Up” and “After the Dance” (respectively).  
20 There is no meaningful similarity between Plaintiffs’ songs and the two Marvin  
21 Gaye songs they supposedly infringe. Plaintiffs’ songs are completely different in  
22 melody, rhythm, harmony, structure, and lyrics from the two Marvin Gaye songs.

23 Regarding “Blurred Lines,” Defendants base their infringement claim on  
24 eight alleged “Similarities” to “Got to Give It Up” identified in their Counterclaims.  
25 Most of these are based on commonplace elements of Marvin Gaye’s sound  
26 recording of “Got to Give It Up” that Marvin Gaye did not include in the sheet  
27 music he submitted to the Copyright Office in 1977 to register his copyright and  
28 thus are not part of his copyrighted composition that Defendants claim to own.

1           There is a difference between a sound recording and a composition.  
2 Defendants do not own the Marvin Gaye sound recording—only the composition.  
3 Any alleged similarity between “Blurred Lines” and the Marvin Gaye recording of  
4 “Got to Give It Up” is irrelevant here. Any arrangement or performance elements of  
5 the Marvin Gaye sound recording that are not also contained in Defendants’  
6 copyrighted composition (registered as sheet music with the United States Copyright  
7 Office in 1977) cannot be infringed in “Blurred Lines,” regardless of any supposed  
8 similarity in the recordings. If this case proceeds to trial, the jury will be asked to  
9 determine only whether “Blurred Lines” is substantially similar to any original  
10 elements contained in the sheet music deposit that is the copyrighted composition.

11           There are no substantial similarities. The eight alleged “Similarities” consist  
12 of unprotectable, commonplace *ideas* allegedly found in both songs—such as the  
13 *idea* of using a cowbell (but in completely different rhythms), the *idea* of repeating a  
14 note in a melody (but not the same note or repeated in the same way), or the *idea* of  
15 using backup vocals (but not the same harmony or rhythm). Some of these ideas are  
16 only elements in the Marvin Gaye sound recording and not compositional elements.  
17 Moreover, copyright only protects original *expression*—specific notes, rhythms, and  
18 harmonies fixed in a tangible form—not mere *ideas*, such as the *idea* of using a  
19 cowbell, party noise, etc. No expression of the actual notes is remotely similar here.

20           The alleged melodic “similarities” between “Blurred Lines” and “Got to Give  
21 It Up” identified in Defendants’ musicologist report do not contain two consecutive  
22 notes with the same pitch and duration and placement in the measure (*i.e.*, rhythm)  
23 in both songs. This is highly unusual in an infringement claim. The notes of the  
24 Marvin Gaye song are not copied in “Blurred Lines.” Mere ideas are not protected.

25           The only reason Defendants claim infringement here is because Plaintiffs  
26 made certain comments in promoting their record about being inspired by Marvin  
27 Gaye. Defendants smelled money and rushed to make their infringement demand,  
28 but they chose to ignore that the songs had no similarity in actual notes or phrases.

1 With regard to “Love After War,” the infringement claim is even more  
2 tenuous. “Love After War” has only one note in common with “After the Dance.”  
3 No one can claim a copyright in a single note. The claim is legally preposterous.

4 Prior to filing their Counterclaims, Defendants attempted without success to  
5 persuade their music publisher to file these infringement claims against Plaintiffs,  
6 but their publisher not only refused to do so, it advised Defendants after consulting  
7 with a musicologist that there was no basis for an infringement claim, and that it  
8 could not file such a claim consistent with Federal Rule of Civil Procedure 11.  
9 [Joint Rule 16(b) Report, filed 12/6/12, Dkt. #48, in Court’s file, p. 6, lines 6-8.]

10 Summary judgment is warranted and should be entered forthwith.

11 **II.**

12 **SUMMARY OF CLAIMS**

13 Plaintiffs’ Complaint alleges a single claim for declaratory relief seeking a  
14 judgment decreeing that “Blurred Lines” does not infringe “Got to Give It Up.”  
15 [Complaint for Declaratory Relief, filed August 15, 2013, in Court’s file.]

16 Defendants allege two counter-claims<sup>1</sup> for relief: (a) the first claim alleges  
17 that Plaintiffs’ composition and sound recording “Blurred Lines” (“BLURRED”)  
18 infringes Defendants’ alleged copyright in the Marvin Gaye composition, “Got to  
19 Give It Up” (“GIVE”); and, (b) the second claim alleges that the composition and  
20 sound recording, “Love After War” (“WAR”), written by Plaintiff Robin Thicke and  
21 Counter-Defendant Paula Patton, infringes Defendants’ alleged copyright in the  
22 Marvin Gaye composition, “After the Dance” (“DANCE”). [Defendants’ Frankie  
23 Christian Gaye and Nona Marvisa Gaye Counterclaims (“Frankie/Nona  
24 Counterclaims”), filed October 30, 2013, in Court’s file; Defendant Marvin Gaye  
25 III’s Counterclaim (“Marvin Counterclaim”), filed on November 19, 2013, in

26 \_\_\_\_\_  
27 <sup>1</sup> “Count 1” and “Count 2” in the Frankie/Nona Counterclaims, and “First Cause of  
28 Action” and “Second Cause of Action” in the Marvin Counterclaim.

1 Court’s file (Document 36).] Defendants allege that they own the copyright in the  
2 compositions only for GIVE and DANCE—not the Marvin Gaye sound recordings.  
3 [Frankie/Nona Counterclaims, ¶¶ 73, 93; Marvin Counterclaim, ¶¶ 37, 55.]

4 There is no evidence of any direct copying by Plaintiffs of GIVE or DANCE.

5 **III.**

6 **ARGUMENT: THE COURT SHOULD GRANT SUMMARY JUDGMENT**

7 **A. Summary Judgment Is Proper Here—There Is No Substantial Similarity**

8 To establish a claim for copyright infringement, the plaintiff must show that:

9 (a) the plaintiff owns a valid copyright in the work that allegedly has been infringed;  
10 and (b) the defendant copied protected elements of the plaintiff’s work. *Brown Bag*  
11 *Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9<sup>th</sup> Cir. 1992).

12 “Because direct evidence of copying is not available in most cases, plaintiff  
13 may establish copying by showing that defendant had access to plaintiff’s work and  
14 that the two works are ‘substantially similar’ in idea and in expression of the idea.”  
15 *Smith v. Jackson*, 84 F.3d 1213, 1219 (9<sup>th</sup> Cir. 1996); *Brown Bag*, 960 F.2d at 1472.

16 “Summary judgment for a defendant accused of copyright infringement is  
17 appropriate when the plaintiff fails to show a genuine issue regarding whether the  
18 ideas and expressive elements of the works are substantially similar.” *Brown Bag*,  
19 960 F.2d at 1472. “[S]ummary judgment is appropriate if the court can conclude,  
20 after viewing the evidence and drawing inferences in a manner most favorable to the  
21 non-moving party, that no reasonable juror could find substantial similarity of ideas  
22 and expression.” *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9<sup>th</sup> Cir. 1990).

23 The Ninth Circuit has “frequently affirmed summary judgment in favor of  
24 copyright defendants on the issue of substantial similarity.” *Id.*

25 **B. Analytic Dissection Merits a Finding of No Infringement Where—as**  
26 **Here—the Material Claimed to Be Infringed Is Not Original Expression**

27 “In determining whether two works are substantially similar, we employ a  
28 two-part analysis: an objective extrinsic test and a subjective intrinsic test.” *Swirsky*

1 *v. Carey*, 376 F.3d 841, 845 (9<sup>th</sup> Cir. 2004). “For the purposes of summary  
2 judgment, only the extrinsic test is important because the subjective question  
3 whether works are intrinsically similar must be left to the jury.” *Id.*

4 “The extrinsic test considers whether two works share a similarity of ideas  
5 and expression as measured by external, objective criteria” and “requires ‘analytical  
6 dissection of a work and expert testimony.’” *Swirsky*, 376 F.3d at 845 (quoting  
7 *Three Boys Music Corp. v. Bolton*, 212 F.3d 472, 485 (9<sup>th</sup> Cir. 2000)). “Analytic  
8 dissection requires breaking the works compared down into their constituent  
9 elements, and comparing those elements for proof of copying as measured by  
10 substantial similarity.” *Sony Pictures Entertainment, Inc. v. Fireworks*  
11 *Entertainment Group, Inc.*, 156 F.Supp.2d 1148, 1157 (C.D. Cal 2001). “It is the  
12 copyright plaintiff’s burden to identify the elements for this comparison.” *Id.*

13 “Because the requirement is one of substantial similarity to *protected*  
14 elements of the copyrighted work, it is essential to distinguish between the protected  
15 and unprotected material in a plaintiff’s work.” *Swirsky*, 376 F.3d at 845 (emphasis  
16 in original)(citing cases). Substantial similarity refers to “‘similarity of expression,  
17 not merely similarity of ideas or concepts.’” *Sony Pictures*, 156 F.Supp.2d at 1156  
18 (quoting *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394,  
19 1398 (9<sup>th</sup> Cir. 1997) (citing 17 U.S.C. § 102(b)))(emphasis added).

20 [T]he party claiming infringement may place “no reliance upon any  
21 similarity in expression resulting from” unprotectable elements. ...

22 Otherwise, there would be no point to the extrinsic test, or to  
23 distinguishing ideas from expression.

24 *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9<sup>th</sup> Cir. 1994)(quoting  
25 *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9<sup>th</sup> Cir. 1987))(emphasis in original).

26 “Among the ‘unprotectable elements’ which the court must ‘filter’ out of its  
27 comparison of a copyrighted work and an allegedly infringing work are ‘ideas,’ as  
28 distinguished from the ‘expression’ of those ideas; ... elements borrowed from

1 another author or from the ‘public domain’; instances in which a particular  
 2 ‘expression’ at issue ‘merges’ with the ‘idea’ being expressed; and/or a similar  
 3 instance in which the form of the ‘expression’ is so ‘standard’ in the treatment of a  
 4 given ‘idea’ that it constitutes a *scenes a faire* or a ‘scene which must be done.’”  
 5 *Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1129, 1176 -77 (C.D. Cal. 2001). As the  
 6 Ninth Circuit has held, “‘similarities derived from the use of common ideas cannot  
 7 be protected; otherwise, the first to come up with an idea will corner the market.’”  
 8 *Sony Pictures*, 156 F.Supp.2d at 1156 (quoting *Apple Computer*, 35 F.3d at 1443).

9 “‘[A] plaintiff who cannot satisfy the extrinsic test necessarily loses on  
 10 summary judgment, because a jury may not find substantial similarity without  
 11 evidence on both the extrinsic and intrinsic tests.’” *Sony Pictures*, 156 F.Supp.2d at  
 12 1157 (quoting *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9<sup>th</sup>  
 13 Cir. 1994)). In short, only the **original expression** in the plaintiff’s work matters.

#### 14 C. **BLURRED Is Not Substantially Similar to GIVE**

##### 15 1. **The Marvin Gaye Sound Recording of GIVE Is Irrelevant**

16 “Sound recordings and their underlying musical compositions are separate  
 17 works with their own distinct copyrights.” *Newton v. Diamond*, 204 F.Supp.2d  
 18 1244, 1248-49 (C.D. Cal. 2002), *aff’d* 388 F.3d 1189 (9<sup>th</sup> Cir. 2003). “The rights of  
 19 a copyright in a sound recording do not extend to the song itself, and *vice versa*.”  
 20 *Id.* at 1249 (citing cases)(emphasis in original).

21 Here, Defendants allegedly own the copyright in the composition of GIVE,  
 22 not the sound recording. [Stmt. Fact 1.] Defendants’ claims for infringement are  
 23 limited to the registered copyright in the composition. *Newton*, 204 F.Supp.2d at  
 24 1249 (“as Plaintiff cannot base his infringement action on elements unique to the  
 25 sound recording, the court must first determine precisely what is protected by  
 26 Plaintiff’s copyright over his musical composition”)(emphasis added).

27 Any perceived similarity between BLURRED and the Marvin Gaye sound  
 28 recording of GIVE is entirely irrelevant. Musical elements of GIVE that are not

1 contained in the composition—such as the “groove” of the sound recording, the  
 2 sounds of the instruments, or other recording or performance elements (*e.g.*, falsetto  
 3 singing, party noise)—simply have no bearing on the infringement claim here. The  
 4 jury may not consider these elements at trial in assessing substantial similarity.  
 5 *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 207 (9<sup>th</sup> Cir. 1989)  
 6 (reversing where erroneous jury instruction failed to distinguish *protectable* material  
 7 and made it possible for the jury to find copying based on unprotectable elements).

8 **2. Defendants’ Copyright Is Limited to the Copyright Deposit**

9 A copyright infringement action may not be instituted until registration of the  
 10 copyright claim. 17 U.S.C. § 411(a). A copyright claim is registered by, among  
 11 other requirements, “delivering to the Copyright Office the deposit specified in this  
 12 section . . . .” 17 U.S.C. § 408(a)(emphasis added). The deposit required is a  
 13 “complete” copy of the work. 17 U.S.C. § 408(b)(1)-(2); *Kodadek v. MTV*  
 14 *Networks, Inc.*, 152 F.3d 1209, 1211 (9<sup>th</sup> Cir. 1998) (“an applicant must deposit as  
 15 part of his application a ‘copy’ or ‘copies’ of the work”). A “complete copy is one  
 16 which ‘represent[s] the entire copyrightable content of the work for which  
 17 registration is sought.’” *Shady Records, Inc. v. Source Enterprises, Inc.*, 2005 WL  
 18 14920 at \*13 (S.D.N.Y. June 3, 2005)(quoting 37 C.F.R. § 202.20(b)(2)(i)).

19 The scope of a registered copyright is limited to what is set forth in the  
 20 copyright deposit. *Shady Records*, 2005 WL 14920 at \*14; *Cobris Corp. v.*  
 21 *Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1115 (W.D. Wash. 2004)(without the  
 22 deposit, the plaintiff could not show that the subject photograph was among the  
 23 photographs covered by its registration); *M & D International Corp. v. Chan*, 901  
 24 F.Supp. 1502, 1510 (D. Hawaii 1995)(“it has been suggested that an infringement  
 25 ‘action may be maintained only to vindicate infringement of [the version of the]  
 26 work deposited with the registration’”(quoting *E. Mishan & Sons, Inc. v.*  
 27 *Marycana, Inc.*, 662 F.Supp. 1339, 1342 (S.D.N.Y. 1987), also citing *Nimmer on*  
 28 *Copyright* § 7.17[A]); *Amini Innovation Corp. v. Anthony California, Inc.*, 2004

1 WL5545445 at \*6 (C.D. Cal. December 3, 2004)(limiting scope of protection to the  
2 deposit and references to the material in the copyright application).

3 In *Shady Records*, the plaintiff had submitted as its copyright deposit excerpts  
4 of the two songs it sued over; the court held that the copyright registration was valid  
5 only as to the excerpts of the song that were contained in the deposit. *Id.* at \*14.

6 Here, the copyright deposit submitted for GIVE is sheet music (“GIVE  
7 Copyright Deposit”). [Stmt, Fact, 2.] That sheet music limits the scope of  
8 Defendants’ copyright in the GIVE composition. *Shady Records*, 2005 WL 14920  
9 at \*14. Defendants cannot sue here over any elements of GIVE that Marvin Gaye  
10 did not register; a registration is a prerequisite to filing suit. 17 U.S.C. § 411(a).

11 As discussed below, most of the material in the alleged “Similarities”  
12 between the two songs is material that is not contained in the GIVE Copyright  
13 Deposit. Any such unregistered material cannot be the basis for liability here.

14 **3. BLURRED and GIVE Are Not Substantially Similar**

15 As pointed out above, Defendants’ music publisher refused to file these  
16 claims and told Defendants that it could not do so without violating Rule 11. The  
17 publisher was right. There is no substantial similarity in the melody, harmony,  
18 rhythm, structure, or lyrics of BLURRED and GIVE. [Statement of Uncontroverted  
19 Facts and Conclusions of Law (“Stmt”), Undisputed Facts (“Facts”) 3-10.]

20 The melodies of the two songs are different. There is no melodic phrase in  
21 BLURRED that also appears in GIVE. [Stmt, Fact 4.]

22 The harmonies are not similar. [Stmt, Facts 5-7.] There is no sequence of  
23 two chords played in the same order and for the same number of measures  
24 (duration) in GIVE and BLURRED. [Stmt, Fact 5.] GIVE and BLURRED do not  
25 contain three chords in common. [Stmt, Fact 5.] Moreover, GIVE has a bluesy or  
26 minor sound due to the use of flatted thirds and minor chords, whereas BLURRED  
27 has no minor chords or minor thirds and has a major sound. [Stmt, Fact 7.]

28 ///

1 The rhythms are different. BLURRED has prominent sixteenth note rhythms,  
2 whereas GIVE has a mainly eighth note rhythm. [Stmt, Fact 8.]

3 The structures also are very different. BLURRED has a traditional pop song  
4 structure (verse, pre-chorus, chorus), whereas GIVE has a two-part verse that  
5 repeats several times and has no chorus, among other differences. [Stmt, Fact 9.]

6 The lyrics are entirely different. There are no lyrical phrases in common.  
7 [Stmt, Fact 10.] There is no substantial similarity between the two works.

8 **4. The Finell Report Fails to Identify Any Substantial Similarity**

9 It is Defendants’ burden to identify the portions of the songs that allegedly are  
10 substantially similar. *Sony Pictures*, 156 F.Supp.2d at 1157. Defendants do so in  
11 the Finell Report incorporated in and attached to their Counterclaims. [Stmt, Fact  
12 11.] The “constellation” of eight alleged Similarities described in the Finell Report  
13 [Stmt, Facts 11-12], however, are not substantial similarities or similarities at all.

14 **(a) Most of the Alleged Similarities Are Not In the Deposit**

15 Of the eight alleged Similarities and the “Additional Distinctive Similarities”  
16 identified in the Finell Report, only alleged Similarities 1, 2, and 6A are contained  
17 in the GIVE Copyright Deposit. [Stmt, Fact 14.] The rest of the alleged Similarities  
18 in the Finell Report—*i.e.*, the majority of the alleged Similarities (*i.e.*, Similarities  
19 3-5, 6C, 7, 8, and “Additional Distinctive Similarities”)—are based on material that  
20 is not reflected in the GIVE Copyright Deposit. [*Id.*] Defendants cannot sue for  
21 infringement over this material not contained in their Deposit. It is telling (and fatal  
22 to the claim) that a majority of the material that Defendants base their infringement  
23 claim on is material that Marvin Gaye did not bother to attempt to copyright. The  
24 omitted material is not original or protectable. Marvin Gaye apparently agreed.

25 **(b) The “Constellation” of Alleged Similarities Are Only Ideas,**  
26 **Not Expression—the Notes Used in BLURRED and GIVE Are Not the Same**

27 The eight alleged Similarities identified in the Finell Report are:

28

- 1       •     **Similarity 1: Signature Phrase in Main Vocal Melodies** -- A  
 2       signature phrase that repeats its starting tone several times, contains the  
 3       scale degree sequence 5-6-1 followed by 1-5, contains identical  
 4       rhythms (six eighth notes in a row) for the first six tones, contains a  
 5       melisma on the last lyric beginning with scale degrees 1-5, and has a  
 6       melodic contour that rises and falls over the course of the phrase;  
 7
- 8       •     **Similarity 2: Hooks** -- Hook phrases with some similar notes (though  
 9       with different durations, rhythms, and placement in the measures);
- 10      •     **Similarity 3: Hooks with Backup Vocals** – Hook backup vocals  
 11      (though they do not have the same harmonic voicing, melodic rhythm,  
 12      or overall sound);
- 13      •     **Similarity 4: Core Theme In BLURRED and Backup Hook in**  
 14      **GIVE *and* Similarity 5: Backup Hooks** – Melodic phrases that  
 15      contain movement up and down by a half step;
- 16      •     **Similarity 6: Bass Melodies** -- A bass pattern with some similar  
 17      rhythmic elements and scale degrees (1 and b7, the root and flatted  
 18      seventh scale degrees), and a descending bass pattern (though with  
 19      different notes and rhythm) at the end of the eight measure bass phrase;
- 20      •     **Similarity 7: Keyboard Parts** -- A keyboard part that plays chords on  
 21      some offbeats; and,
- 22      •     **Similarity 8: Unusual Percussion Choices** -- A cowbell, and an open  
 23      high-hat sound on the “+” of the fourth beat. [Stmt, Fact 12.]

24       As discussed in detail below, with respect to each of these supposed  
 25       Similarities, any alleged “similarity” is only in unprotectable *ideas* that are the basic  
 26       building blocks of composition available to all composers (repeated starting tone,  
 27       melisma, use of a cowbell, etc.)—the specific *expression* of those ideas is different.  
 28       Using the same ideas—but not the same expression (notes)—is not illegal copying.  
 29       *Sony Pictures*, 156 F.Supp.2d at 1156 (substantial similarity “refers to similarity of  
 30       expression, not merely similarity of ideas or concepts”) (emphasis added).

31                   (c)     **The Combination of Alleged Similarities Is Not Protectable**

32       Defendants apparently contend that the eight unprotectable elements in  
 33       GIVE—which, as shown below, are not similar in expression (notes) to BLURRED  
 34       or are simply commonplace devices or ideas standing alone and hence not  
 35       protectable—are somehow protectable in the aggregate as combined in GIVE.

36       ///

1 “It is true, of course, that a *combination* of unprotectable elements may  
2 qualify for copyright protection.” *Satava v. Lowry*, 323 F.3d 805, 811 (9<sup>th</sup> Cir.  
3 2003). “Each note in a scale, for example, is not unprotectable, but a pattern of  
4 notes in a tune may earn copyright protection.” *Metcalf v. Bochco*, 294 F.3d 1069,  
5 1074 (9<sup>th</sup> Cir. 2002). “But it is not true that *any* combination of protectable elements  
6 automatically qualifies for copyright protection.” *Satava*, 323 F.3d at 811 (italics in  
7 original). A “combination of unprotectable elements is eligible for copyright  
8 protection **only if those elements are numerous enough and their selection and**  
9 **arrangement original enough that their combination constitutes an original**  
10 **work of authorship.”** *Id.* (citing cases)(bold emphasis added). *Satava* concerned  
11 alleged infringement of glass jellyfish sculptures. The court held that the  
12 combination of unprotectable elements in the plaintiff’s work—”clear glass, oblong  
13 shroud, bright colors, proportion, vertical orientation, and stereotyped jellyfish  
14 form”—lacked the “quantum of originality” required for protection. *Id.* at 811-12.

15 Here, the “constellation” of alleged Similarities identified in the Finell Report  
16 are commonplace and generic building blocks of musical composition. Numerous  
17 songs contain, *e.g.*, a repeated starting tone; six eighth notes in a row; a melodic  
18 contour that rises and falls; backup vocals, the scale degree sequence 5-6-1; melodic  
19 phrases that share several pitches or that move up and down by a half step; a  
20 cowbell; an open hi-hat; a keyboard playing off the beat, or a bass that plays the root  
21 on the first beat. [Stmt, Fact 17.] These generic ideas that comprise the alleged  
22 Similarities are commonplace building blocks of composition. [Stmt, Fact 17.]

23 For example, “Low Rider” by War from 1975 (prior art, released before “Got  
24 to Give It Up”) contains a prominent cowbell part, electric piano that emphasizes  
25 chords on the offbeats, a bass melody that emphasizes the root and the flatted  
26 seventh scale degrees, and a melodic phrase that goes down and up in half step  
27 intervals, and a hook melody that repeats its starting tone several times, contains six  
28 eighth notes in a row, and has a melodic contour that goes up and then down over

1 the course of the melodic phrase. [Stmt, Fact 19.]

2 Likewise, the 1972 song “Superfly” by Curtis Mayfield (more prior art)  
3 contains falsetto vocals, the use of a cowbell and an open hi-hat on the “+” of the  
4 fourth beat, and a bass line that plays the root of the chord on the downbeat. [Stmt,  
5 Fact 20.] The 1980 song “Funkytown” by Lipps Inc. has a cowbell part, repeated  
6 starting tones in the vocal and instrumental melodies, a melodic phrase that contains  
7 six (or more) eighth notes in a row, a bass line that emphasizes the root and flatted  
8 seventh of the chord, and a descending bass line with alternating octave notes.  
9 [Stmt, Fact 21.]

10 Filtering out each of these unprotectable, commonplace ideas—both  
11 individually and as they have appeared combined in other works—leaves GIVE  
12 with virtually no combination of elements that is itself original, let alone substantial.  
13 The “selection, coordination, and arrangement” of unprotectable ideas and elements  
14 in GIVE are not sufficiently original to merit protection. *Satava*, 323 F.3d at 811.

15 Moreover, “such ‘lists’ of similarities” are to be discouraged ..., as a list of  
16 ‘random similarities scattered throughout the works’ does not connote a ‘substantial  
17 similarity’ overall.” *Idema*, 162 F.Supp.2d at 1180 (quoting *Kouf*, 16 F.3d at 1045).  
18 It would turn copyright law on its head to allow the Gayes to claim a copyright in  
19 the “combination” of musical building blocks—*i.e.*, a repeated starting tone, backup  
20 vocals, a bass playing the root of the chord—when the actual similarity in notes is  
21 virtually non-existent. There is no authority for Defendants’ claimed monopoly on  
22 these common ideas that are building blocks of musical composition.

23 Besides, when a plaintiff claims copyright in the selection and arrangement of  
24 otherwise unprotectable elements, the plaintiff is entitled only to “thin” copyright  
25 protection, meaning the defendant’s work must be *virtually identical* to infringe. *Id.*  
26 at 1178 (where a copyrighted work is “composed largely of ‘unprotectable’  
27 elements ..., it receives a ‘thin’ scope of protection”); *Apple*, 35 F.3d at 1446;  
28 *Peters v. West*, 776 F.Supp.2d 742, 750-51 (E.D. Ill. 2011)(finding no infringement

1 where the defendant’s song did not use the “contested combination of unprotectable  
2 elements ... in their entirety in a *nearly identical format*”(emphasis added).

3 Here, at the very most, Defendants’ alleged combination of unprotectable  
4 ideas—taken together—is entitled to only “thin” copyright protection, meaning any  
5 copying must be “virtually identical.” *Apple*, 35 F.3d at 1446. As shown below,  
6 GIVE and BLURRED are not substantially similar, let alone “virtually identical.” It  
7 is very telling that the “constellation” of alleged Similarities does not define what  
8 any specific composition will sound like. A composition that contains all of the  
9 Finell Report elements could very easily sound nothing like GIVE. [Stmt, Fact 18.]  
10 That is because what the Gayes claim is similar are abstract ideas, not expression.

11 **(d) Any Similarity in Protectable Expression Is *De Minimis***

12 The alleged Similarities are largely melodic. [Stmt, Fact 13.] Yet there are  
13 no two consecutive notes in any of the melodic examples in the Finell Report that  
14 have the same pitch, duration, and placement in the measure in BLURRED and  
15 GIVE. [Stmt, Fact 13.] This is a stunning difference.

16 As discussed below, in the Signature Phrases of BLURRED and GIVE, there  
17 is only one note with the same pitch and placement in the measure in each two  
18 measure melodic phrase. Or, as another example, the GIVE Theme X does not  
19 occur—*i.e.*, the same notes in the same rhythm—anywhere in BLURRED. In the  
20 bass pattern, the only note in common is the root of the chord played on the first  
21 beat of the measure, which is a commonplace role of the bass in pop music. The  
22 cowbell parts in the two songs have completely different rhythms. There is simply  
23 nothing in common between the two songs that—even assuming *arguendo* it was  
24 copied, which Plaintiffs/Counterdefendants deny—constitutes actionable copying.

25 “The principle that trivial copying does not constitute actionable infringement  
26 has long been a part of copyright law.” *Newton*, 388 F.3d at 1193. For copying to  
27 be actionable, the use must be significant enough to constitute infringement. *Id.* at  
28 1193. “To establish that the infringement of a copyright is *de minimis*, and therefore

1 not actionable, the alleged infringer must demonstrate that the copying of the  
 2 protected material is so trivial ‘as to fall below the quantitative threshold of  
 3 actionable copying, which is always a required element of actionable copying.’”  
 4 *Newton*, 204 F.Supp.2d at 1246 (quoting *Sandoval v. New Line Cinema Corp.*, 147  
 5 F.3d 215, 217 (2d Cir. 1998)). Here, any similarity in BLURRED and GIVE is *de*  
 6 *minimis* and does not meet “the quantitative threshold of actionable copying.” *Id.*

7 **(e) The Signature Phrases, Hooks, and Bass Melodies in**  
 8 **BLURRED and GIVE Are Not Substantially Similar**

9 Similarities 1 (Signature Phrase), 2 (Hook), and 6A (bass melody) of the eight  
 10 Similarities in the Finell Report are the only alleged Similarities that are based on  
 11 compositional elements that are actually reflected in the GIVE Copyright Deposit.  
 12 None of these three elements in GIVE has any substantial similarity to BLURRED.

13 **(i) The Signature Phrases Are Not Substantially Similar**

14 Similarity 1 concerns the Signature Phrase<sup>2</sup> of each song. There is not a  
 15 single note in the two Signature Phrases that has the same pitch (scale degree),  
 16 duration, and placement in the measure in both Phrases. There is only one note that  
 17 has the same pitch and placement (but not the same duration) in both songs. The  
 18 notes in the two Signature Phrases are substantially different. [Stmt, Facts 23-24.]

19 Below is a transcription of the two Signature Phrases. The yellow  
 20 highlighting below indicates the only one note in both Signature Phrases that has the  
 21 same pitch and placement (but not the same duration) in both songs.

22 Musical Example 1a: "Give it Up" Signature Phrase

23 Give it Up  
 0:19 I used to go out to par - ties

24 Musical Example 1b: "Blurred" Signature Phrase

25 Blurred  
 0:47 and that's why I'm goin' take a good girl

26 <sup>2</sup> For ease of reference, this Motion adopts the terminology of the Finell Report in  
 27 referring to the various melodic phrases at issue. Moving parties do not concede  
 28 that these phrases are, indeed, the “signature phrase” or “hook” of either song.

1 [Stmt, Facts 23-24.]

2 The chords (*i.e.*, harmonies) of the two Signature Phrases are different. In  
 3 GIVE, the chord is A7; in BLURRED, the chords are E and A (one measure each).

4 [Stmt, Facts 23-24.] The lyrics and rhythms of the two Phrases are different. [*Id.*]

5 The Finell Report ignores one glaring difference between the two phrases that  
 6 helps explain why the two Signature Phrases *do not sound alike*. The last note in the  
 7 first measure of GIVE is the 2<sup>nd</sup> scale degree, which is held for two full beats (into  
 8 the second measure of the Signature Phrase). The 2<sup>nd</sup> scale degree is emphasized in  
 9 GIVE and is an important note in the melodic phrase because it creates harmonic  
 10 tension (the 2<sup>nd</sup> scale degree is not a stable note) and rhythmic tension (it is sung  
 11 before the first beat (strongest beat) of the next measure and then held for another  
 12 1½ beats in duration). The 2<sup>nd</sup> scale degree is not in BLURRED. [Stmt, Fact 25.]

13 Below is a transcription with yellow highlighting to indicate the held 2<sup>nd</sup> scale  
 14 degree on the offbeat in GIVE versus the different scale degrees (1<sup>st</sup> scale degree,  
 15 the most stable note) and rhythm in BLURRED in that same part of the Phrase.

16 Musical Example 1A: "Give It Up" Signature Phrase

17  
 18  
 19  
 20  
 21  
 22

23 Musical Example 1B: "Blurred" Signature Phrase

24  
 25  
 26  
 27  
 28

1 [Stmt, Facts 23-24.] There is no substantial similarity, as can be seen above. This  
 2 same use of the 2<sup>nd</sup> degree also occurs in Similarity 2 (discussed *infra*) and is a  
 3 substantial difference from BLURRED there, too, and ignored in the Finell Report.

4 The Finell Report states that both Signature Phrases: (i) “repeat their starting  
 5 tone several times;” (ii) contain the “identical scale degree sequence of 5-6-1  
 6 followed by 1-5;” (iii) “contain identical rhythms for the first six tones” (six eighth  
 7 notes in a row); (iv) use the same device of a melodic “tail” (melisma); and (v) have  
 8 similar melodic contours. [Stmt, Facts 26, 28, 31, 34, 35.] Each of these musical  
 9 devices is commonplace. [Stmt, Facts 26, 30, 31, 33, 35.] The actual expression of  
 10 these generic ideas (repeating a tone, six eighth notes in a row, a melisma, etc.) is  
 11 quite different in BLURRED and GIVE, including that: (i) the repeated starting  
 12 tones are different scale degrees and sequences (in GIVE, 5-5-5-5; in BLURRED, 3-  
 13 3-2#-3); (ii) the six eighth notes are different pitches (in GIVE, 5-5-5-5-6-1; in  
 14 BLURRED, 3-3-2#-3-5-6); (iii) the 5-6-1 sequences start at different locations, are  
 15 preceded and followed by different notes, and in GIVE the 2<sup>nd</sup> scale degree comes in  
 16 the middle of the “5-6-1 followed by 1-5” sequence and is held for two beats, which  
 17 does not occur in BLURRED and is a material difference (see discussion above);  
 18 (iv) the melismas end on different pitches and have different rhythms and contours;  
 19 and (v) the direction of movement between notes—*i.e.*, up (U), down (D), or same  
 20 (S)—in each song is quite different (in GIVE: -S-S-U-U-U-D-D-U; in BLURRED:  
 21 S-D-U-U-U-U-S-S-D-D-D). [Stmt, Facts 26-35.] The two Phrases are not similar.

22 In two prior and unrelated cases where she was an expert, Ms. Finell opined  
 23 that a 5-6-1 sequence was a substantial similarity. [Declaration of Seth Miller  
 24 (“Miller Decl”), Exh. F, ¶ 32 (“the scale degrees are 5-6-1-6-5 in both songs”); Exh.  
 25 G, ¶ 7 (opining that the hook contained the sequence “5-6-1-2”).] The sequence “5-  
 26 6-1-2” [Miller Decl, Exh. G] is the same sequence as here in GIVE. The sequence  
 27 5-6-1 is commonplace. The Gayes do not own 3 out of the 7 scale degrees in the  
 28 musical scale. And the rest of the Signature Phrase notes are significantly different.

1 (ii) **The Hooks In Each Song Are Not Substantially Similar**

2 Alleged Similarity 2 concerns the “hook” of each song. The duration,  
3 placement, rhythm, melody, and harmony of the hooks are each different. As  
4 discussed above, the significant emphasis on the 2<sup>nd</sup> scale degree in GIVE is not  
5 found in BLURRED. Below is a transcription of the two hooks, from which it is  
6 readily apparent that the number of notes, their duration and placement in the  
7 measure, and their rhythms are different, as is the 2<sup>nd</sup> scale degree that is held and  
8 emphasized in GIVE (highlighted in yellow below) and that is not found in  
9 BLURRED. [Stmt, Facts 36-37.]

10 Musical Example 2a: "Give it Up" Hook  
11 Give it Up 3:12  
12 Musical Example 2b: "Blurred" Hook  
13 Blurred 0:49  
14

15 (iii) **The Bass Patterns Are Not Substantially Similar**

16 Alleged Similarity 6A concerns the bass patterns in the first four measures of  
17 the respective eight measure sequences in GIVE and BLURRED. There are no  
18 substantial similarities in the second four measures of those bass sequences, which  
19 have entirely different chords and notes in GIVE and BLURRED. [Stmt, Fact 48.]

20 The only notes in both bass patterns that have the same pitch, duration, and  
21 placement in the measure in each song are the 1<sup>st</sup> scale degree of the chord played  
22 on the first beat of the first measure and on the “+” of four in the first and second  
23 measures. [Stmt, Fact 49.] It is a commonplace musical device to have the bass  
24 play the root note (1<sup>st</sup> scale degree) on the first beat of a measure. [Stmt, Fact. 50.]

25 In BLURRED, the bass plays the root on the first beat of every measure. In  
26 GIVE, the bass does not play the root on the first beat of any measure except the  
27 first measure of the four measure bass pattern. [Stmt, Facts 50-51.] There are no  
28 similarities between the bass patterns other than playing the root—but where it is

1 played and the other notes are different in each song. [Stmt, Fact 52.] The bass  
 2 notes shared between GIVE and BLURRED are not original to GIVE and were used  
 3 in “Superfly” by Curtis Mayfield in 1972, five years before GIVE was written.

4 Below is a transcription comparing the bass patterns in BLURRED, GIVE,  
 5 and “Superfly” (SF) (transposed to the key of A), with the notes that have the same  
 6 scale degree and placement in the measure in each song highlighted in yellow. (In  
 7 “Superfly,” the 1<sup>st</sup> scale degree is an octave lower and thus appears at a lower  
 8 position in the musical staff but it is the same scale degree.) As can be seen, every  
 9 note in common (same pitch and location) in GIVE and BLURRED also appears in  
 10 “Superfly.” Indeed, BLURRED is more similar to “Superfly” than it is to GIVE.

11

12

13

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16

The image shows a musical transcription of bass lines for three songs: GIVE (6A), BLURRED (6B), and SF. Each staff is in bass clef with a key signature of one sharp (F#). The notes are transposed to the key of A. Yellow highlights are placed under specific notes in each staff to show similarities. Fingerings (1, b7, 4, 5) are indicated above the notes.

17 [Stmt, Fact 53.] There is nothing original to GIVE in the notes in common with  
 18 BLURRED. The only minimal similarity in the bass lines relates to commonplace  
 19 ideas (playing the root on or before the first beat) that are not protectable in GIVE.

20 **(f) The Other Alleged Similarities Between BLURRED and**  
 21 **GIVE Are Not Substantially Similar in the Actual Expression in Each Song**

22 The remainder of the alleged Similarities identified in the Finell Report—  
 23 alleged Similarities 3-5, 6C, 7-8, and the alleged Additional Distinctive  
 24 Similarities—are not contained in the GIVE Copyright Deposit. [Stmt, Fact 14.]  
 25 Defendants cannot sue over these unregistered elements. 17 U.S.C. § 411(a).

26 **(i) The Back-Up Vocals Are Not Substantially Similar**

27 Alleged Similarity 3 concerns back-up vocals for the “hooks” discussed  
 28 above (alleged Similarity 2). Backup vocals are a commonplace device. There is

1 nothing original about having backup vocals beneath a lead vocal in popular music.  
 2 The backup vocals in GIVE and BLURRED have different pitches, durations, and  
 3 melodic rhythms and placement in the measure. [Stmt, Facts 38-40.] Below is a  
 4 transcription of the two hooks with backup vocals, as annotated to highlight in  
 5 yellow only the backup vocal notes in the two songs. [Stmt, Fact 40.] The vast  
 6 difference in *expression* in the use of backup vocals is obvious from the below.

7

8 **Musical Example 3a: "Give it Up" Hook with Backup Vocals**

9 Give it Up 3:12  
 keep on danc - ing

10 **Musical Example 3b: "Blurred Lines" Hook with Backup Vocals**

11 Blurred  
 take a good girl

12

13 **(ii) Theme X Is Not Substantially Similar in Each Song**

14 Alleged Similarity 4 concerns what the Finell Report refers to as Theme X in  
 15 GIVE and BLURRED. [Stmt, Fact 41.] The GIVE Theme X consists of a  
 16 commonplace chromatic pitch movement. The melody moves down a half-step  
 17 interval then up a half-step interval. The GIVE scale degrees are 3-3-2#-3, or c#-c#-  
 18 b#-c#. [Stmt, Fact 42.] The GIVE Theme X does not appear in BLURRED.  
 19 BLURRED does not contain the same series of notes—with the same pitch,  
 20 duration, rhythm, and placement in the measure—as the GIVE Theme X. [Stmt,  
 21 Fact 45.] That there are melodic phrases in BLURRED that include chromatic  
 22 movement is not actionable.

23 Chromatic movement is a commonplace musical idea or device. There is  
 24 nothing original about melodic movement up and down by half-step intervals, which  
 25 can be found in numerous songs, *e.g.*, the children’s song “Hokey Pokey” (the half-  
 26 step movement is found, *e.g.*, at “you do the hokey pokey”). [Stmt, Fact 43.]

27 The 1966 Lee Dorsey song, “Working In a Coal Mine,” contains a melodic  
 28 phrase with the *identical notes* – *i.e.*, the identical scale degrees, note duration,

1 placement, rhythm, and chromatic movement – as three of the four examples  
 2 (Musical Examples 4B-4D) of the BLURRED Theme X (and, with the exception of  
 3 one note, in Example 4C). Theme X in BLURRED is much closer to the earlier  
 4 “Working In a Coal Mine” (“Working”) than it is to GIVE. Below is a transcription  
 5 of GIVE, BLURRED, and “Working” with the notes that have the same pitch and  
 6 placement in the measure highlighted. As can be seen, “Working” has all the same  
 7 notes as BLURRED, whereas GIVE has only two common notes. [Stmt, Fact 44.]

8  
 9 Give it Up 4A  
 10 danc - ing la - dy, danc - ing la - dy, danc - ing la - dy  
 11 Blurred 4B  
 12 if you can't hear, if you can't read  
 13 Working  
 14 Work - ing in a coal mine, go - ing down down down, work - ing in a coal mine  
 15 Blurred 4C  
 16 o - kay now he was close but you're an an - i - mal  
 17 Blurred 4D  
 18 and that's where I'm  
 19 Blurred 4E  
 20 but you're a good girl.

20 The BLURRED Theme X “Musical Example 4E” in the Finell Report does  
 21 not even have the same relative pitches or pitch sequence, let alone placement or  
 22 rhythm, as GIVE. In BLURRED (4E), the pitch sequence is 5-5-4#-5-5; in GIVE, it  
 23 is 3-3-2#-3. The phrases are entirely different. [Stmt, Fact 46.]

24 **(iii) The BLURRED Backup Hook Is Not Substantially**  
 25 **Similar to the GIVE Theme X**

26 Alleged Similarity 5 concerns the BLURRED Backup Hook as compared to  
 27 the GIVE Theme X. The pitch sequences, melodic rhythms, contour and duration of

1 the phrases are different. The pitch sequence in GIVE is 3-3-2#-3; in BLURRED, it  
2 is 4-4#-5. Below is a transcription of the two phrases. [Stmt, Fact 47.]

3

4 Give it Up *Musical Example 5a: "Give it Up" Backup Hook - Theme X*

5 *Musical Example 5b: "Blurred" Backup Hook*

6 Blurred

7

8 (iv) **The Descending Bass Melodies Are Not Substantially**

9 **Similar**

10 Musical Example 6C in the Finell Report concerns the descending bass  
11 pattern at the end of the eight measure bass phrase in each song. It is a  
12 commonplace musical device to have a descending bass line at the end of a phrase.  
13 Here, there is only one note with the same pitch and placement in the measure in  
14 each phrase, *highlighted in yellow* in the below transcription. That single common  
15 note is not part of the descending melody (Musical Example 6C)—it is the first note  
16 of the next bass phrase (Musical Example 6A, above). [Stmt, Facts 54-58.]

17

18 Give it Up *Musical Example 6d: "Blurred" Descending Bass Melody*

19

20 Blurred

21

22 The bass endings are not substantially similar, including that they do not share  
23 a single note with the same pitch, duration, and placement in the measure, do not  
24 have the same rhythm, and are in support of different chords. [Stmt, Fact 55.]

25 (v) **The Keyboard Parts Are Not Substantially Similar**

26 Alleged Similarity 7 pertains to the keyboard parts in each song, which each  
27 include chords played on the offbeats. It is a commonplace musical idea to have a  
28 piano play chords on the offbeat. The 1975 hit song by War, “Low Rider,” contains

1 an electric piano part that emphasizes chords on the offbeat. The rhythms and  
 2 chords in GIVE and BLURRED are different. The piano in BLURRED plays  
 3 chords on the offbeat of each beat. The piano in GIVE plays four eighth notes in a  
 4 row, then five offbeats, of which the last is held twice as long as the preceding  
 5 chords, followed by an eighth rest. The BLURRED piano chord is an A major triad  
 6 (three notes); the GIVE chord is an A7 (four notes). [Stmt, Facts 59-63.] Any  
 7 similarity does not pertain to protectable expression and, moreover, is *de minimis*.

8 (vi) **The Cowbell and Hi-Hat Parts Are Not Substantially**  
 9 **Similar**

10 Alleged Similarity 8 pertains to the use of a cowbell, and an open hi-hat  
 11 sound on the “+” of the fourth beat of the measure. Both are commonplace musical  
 12 ideas found in songs that predate GIVE and are not original to GIVE. In GIVE,  
 13 there is no “cowbell”—the sound is made with a Coke bottle. [Stmt, Facts 63-68.]

14 The cowbell parts in BLURRED and GIVE have very different rhythms. The  
 15 predominantly 16<sup>th</sup> note rhythms in BLURRED differ significantly from the mainly  
 16 eighth note groove in GIVE. Below is a transcription of the “cowbell” parts:

17  
 18  
 19  
 20  
 21  
 22  
 23  
 24

25 (vii) **The Alleged Additional Distinctive Similarities Are**  
 26 **Unprotected Arrangement/Performance Ideas and Not Part of the Composition**

27 The alleged Additional Distinctive Similarities are the use of falsetto singing,  
 28 the omission of a guitar, and background party sounds contained in GIVE. Falsetto

1 singing predates GIVE. There is no “party noise” in BLURRED. There is nothing  
 2 original in the idea of not using a guitar (plus, GIVE Part 2 has a guitar). Each of  
 3 these alleged Similarities is an arrangement choice, not an element of the musical  
 4 composition, and is not reflected in the Copyright Deposit. [Stmt, Facts 69-72.]

5 **5. In Sum, BLURRED and GIVE Are Not Substantially Similar**

6 As shown above, there is virtually no overlap in actual notes in any of the  
 7 material cited in the Finell Report. Any similarities in actual expression are  
 8 insignificant and commonplace practices and do not represent expression that is  
 9 original to GIVE. [Stmt, Fact 76.] Even *had* Plaintiffs copied GIVE—which they  
 10 did not—it would only be *de minimis* copying and hence not actionable.

11 The Finell Report improperly ignores whatever is different—chords, rhythm,  
 12 duration, scale degrees, intervening notes, etc.—in a transparent attempt to find  
 13 similarity where none exists. Most of the Finell Report is based on elements not  
 14 found in the GIVE Copyright Deposit. This type of partial, misleading comparison  
 15 was explicitly rejected by the 9<sup>th</sup> Circuit in *Swirsky*, which held that *all* of the  
 16 compositional elements (pitch, rhythm, harmony, etc.) must be considered in  
 17 comparing for substantial similarity. *Swirsky*, 376 F.3d at 848, fn. 13 (holding that  
 18 focusing “solely on pitch sequence may break music down beyond recognition”).

19 There is no extrinsic similarity. Summary judgment is warranted.

20 **D. WAR Is Not Substantially Similar to DANCE**

21 Defendants’ copyright in DANCE is limited to the material reflected in the  
 22 copyright deposit sheet music (“DANCE Copyright Deposit”). [Stmt, Facts 77-78.]

23 There is no evidence of direct copying of DANCE in WAR. It is baffling  
 24 why Defendants think WAR infringes DANCE. There is no substantial similarity in  
 25 the melody, harmony, rhythm, structure, or lyrics of DANCE and WAR. [Stmt,  
 26 Facts 77-97.] WAR was released in 2011, so Defendants waited several years to file  
 27 suit. Clearly, their reason for suing is something other than any notes in common.

28 ///

1 Since Defendants did not attach a report to their Counterclaims for WAR (as  
 2 to do so would have rendered the Counterclaims subject to a motion to dismiss), one  
 3 can only guess at why Defendants think the two disparate songs are similar. The  
 4 only melodic similarity in the entirety of the two songs is in the chorus of each song  
 5 and consists of one note (g#) with the same pitch and placement in the measure,  
 6 repeated four times in the chorus. The melodic rhythm, contour, and duration of

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The image shows a musical score comparing two songs: 'War\*' and 'Dance'. The score is presented in three systems. Each system has a vocal line (War\* or Dance) and a piano accompaniment line. The key signature is E major (three sharps: F#, C#, G#) and the time signature is 4/4. In the first system (lines 7-10), the 'War\*' vocal line has lyrics 'love a - fter war' and the piano line has chords Esus4/F#, B7, E2maj7, Em/A, Bm7, and E4maj7. In the second system (lines 11-14), the 'War\*' vocal line has the same lyrics and the piano line has the same chords. In the third system (lines 15-23), the 'Dance' vocal line has lyrics 'I want you and you want me so' and the piano line has chords Am7, Bm7, Emaj7, Bm7, Am7, Bm7, Emaj7, and Bm7. In all instances, the G# notes in the vocal lines are highlighted in yellow. The piano accompaniment lines also have some notes highlighted in yellow, corresponding to the G# notes in the vocal lines.

24 Likewise, there is no similarity to the harmonies (chord patterns) in the two  
 25 songs other than in the chorus, but any similarity there is slight and not actionable.  
 26 Both choruses use an E major 7 (Emaj7) chord repeated four times in the chorus  
 27 (but at different places in the measure), and a B minor 7 (Bmin7) chord that appears  
 28 only once in WAR but four times in DANCE. The chord patterns in the two songs

1 are different in all other respects. The use of two chords is not a substantial  
2 similarity. The transcription above reflects where the Emaj7 and Bmin7 chords  
3 appear in each chorus. Notably, the Emaj7 chord is played on the first beat of the  
4 second measure (i.e., after the bar line) in WAR but at the end the first measure (i.e.,  
5 before the bar line) in DANCE—a different harmonic rhythm. [Stmt, Facts 86-90.]

6 The ways the melodies interact with the chords and lyrics are different. In  
7 DANCE, a new chord accompanies each melody note and lyric for the first five  
8 measures. In WAR, several notes are sung before a new chord is played. Each note  
9 in WAR is not accompanied by a new chord and lyric. [Stmt, Facts 84-85.]

10 There is no similarity in rhythm, structure, or lyrics between WAR and  
11 DANCE. [Stmt, Facts 80, 93-96.] The songs have no meaningful similarities.

12 As a matter of law, no one can claim copyright in a single note or in the use of  
13 a couple of chords. *Swirsky*, 376 F.2d at 848 (individual chord progressions are  
14 not protected); *Metcalf*, 294 F.3d at 1074 (a single note in a scale is not protectable).

15 There is no substantial similarity. Summary judgment is warranted.

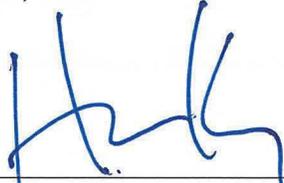
16 **IV.**

17 **CONCLUSION**

18 For the foregoing reasons, the Court should grant the Motion, enter judgment  
19 in favor of Plaintiffs/Counter-Defendants on their Complaint and on the  
20 Counterclaims, and order such other relief as the Court deems just and proper.

21 DATED: July 21, 2014

KING, HOLMES, PATERNO &  
BERLINER, LLP

22  
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24 By: 

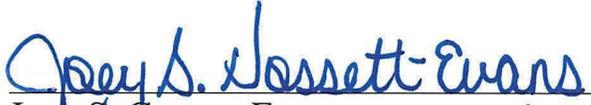
25 HOWARD E. KING  
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 22, 2014, I electronically filed the foregoing **PLAINTIFFS AND COUNTER-DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES** with the Clerk of the Court by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

  
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Joey S. Gossett-Evans