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Defendants Paul David Hewson p/k/a Bono, David Howell Evans p/k/a The Edge or Edge, Adam Clayton, Laurence Joseph Mullen Jr. (collectively, “U2” or the “Band”), and UMG Recordings, Inc., respectfully submit this memorandum of law in support of their motion to dismiss the First Amended Complaint (“FAC”) of Plaintiff Paul Rose pursuant to Rule 12(b)(6).<sup>1</sup>

### **PRELIMINARY STATEMENT**

In response to Defendants’ motion to dismiss (Dkt. 19), Plaintiff amended his complaint. But the amendments change nothing as to the core premise of Defendants’ motion. They do not change how the two songs at issue sound, or the lack of similarity between them.

On October 21, 1991, the iconic rock band U2 released, worldwide and to critical acclaim, a musical composition and sound recording entitled *The Fly*. Despite the fact that *The Fly* received (among other things) massive airplay, Plaintiff waited over 25 years to now claim that *The Fly* is so substantially similar to Plaintiff’s musical composition entitled *Nae Slappin* that it constitutes copyright infringement. If Plaintiff truly believed that *The Fly* infringed *Nae Slappin*, there is no valid reason for Plaintiff’s lengthy delay in asserting his claim, and the FAC does not offer one. Nothing about *The Fly* has changed in the quarter century since it was released. Put simply, the works at issue are entirely different and, as a result, sound nothing alike. This conclusion is inescapable upon simply listening to the two songs, one after the other, which the Court must do on this motion. That is the crux of the ordinary listener test, and because Plaintiff’s claims plainly fail that test, the FAC should be dismissed.

Plaintiff’s FAC adds no specifics about how U2 purportedly copied *Nae Slappin*, or how that song as a whole is substantially similar to *The Fly*. Rather, the FAC continues to make only vague and conclusory references to the two works, and asserts that the two works share musical

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<sup>1</sup> A copy of the FAC (Dkt. 38) is attached as Exhibit A to the accompanying Declaration of David A. Munkittrick dated July 18, 2017 (“Munkittrick Decl.”).

ideas, which are, of course, unprotectable under copyright law. For example, Plaintiff's claim that "the dimensions of sound" in the works are similar identifies a general idea, and not a similarity that is specific, substantial, or actionable. While *artistic expressions* of ideas are protected under copyright law, *ideas* themselves are not.

It is telling that Plaintiff does not submit the full songs with the FAC. Instead, in an unsuccessful attempt to conjure similarity, he resorts to artificial juxtapositions of small snippets of each of the two works. But such manipulations are both unilluminating and irrelevant, as the ordinary listener does not sit down to listen to the songs in successive clips, but rather as a whole. A comparison of the total concept and feel of the two works in their full and unedited form is the applicable substantial similarity analysis, and the one the Court should undertake here.

Though Plaintiff's claim is inadequately pled, the songs themselves are determinative. The most skilled legal writer could not adequately plead copyright infringement in this case, because the claim necessarily includes the substance of the works at issue. The works not only lack substantial similarity, they sound nothing alike. No amount of artful pleading can avoid the works themselves.

Plaintiff's *Nae Slappin* is a series of multiple guitar solos with percussion. There are no vocals and no lyrics. It is improvisational and experimental in feel – a vehicle for Plaintiff to explore various techniques, sounds, and effects on his guitar. At times, he plays in conventional scalar structures and pitches, and at others he coaxes electronic sounds, noises, and whines from his guitar. While *Nae Slappin* may show that Plaintiff is a proficient guitarist, it bears no similarity to *The Fly*.



*The Fly* is a different animal. It is not an extended improvisation at all, but rather follows a traditional rock/pop song structure with a repeated and recognizable chorus and a repeating guitar hook, punctuated by verses. The song alternates between (i) a gritty, even abrasive feel during the verses, with a raw and rhythmic guitar sound and almost chant-like singing, and (ii) lighter, rapturous choruses with falsetto vocal lines and no guitar. There is nothing of the like in *Nae Slappin*, and there is nothing of *Nae Slappin*'s improvisational guitar effects in *The Fly*.

Because the two works are so different that no reasonable jury could find substantial similarity in protectable expression, the FAC should be dismissed in its entirety.

#### **RELEVANT ALLEGED FACTS**

Plaintiff alleges that he is a British musician who wrote and composed *Nae Slappin* in England in 1989. (FAC ¶¶ 4, 10.) Plaintiff further claims that *Nae Slappin* was included on a demo tape that Plaintiff provided to senior executives at Island Records in the summer of 1989. (*Id.* ¶ 11.) *Nae Slappin* is alleged to have been listened to, and liked by, Island Records executives, including Managing Director Marc Marot. (*Id.*) However, there is no allegation that anyone sought to sign Plaintiff to the record label. *Nae Slappin* was allegedly first published in England “no later than the Fall of 1990.” (*Id.* ¶ 10.) Plaintiff claims to have registered *Nae Slappin* with the Mechanical Copyright Protection Society in England in April 1991, resulting in license number No. 1696548A. (*Id.* ¶ 10.)

U2 is an iconic Irish rock band. It signed with Island Records in 1980, and Plaintiff claims that the band members “were often in the Island Records offices,” including in the office of Mr. Marot, between 1989 and 1991. (*Id.* ¶ 12.) Sometime in 1990, the Band began recording sessions for what would become the album *Achtung Baby*, which was released on November 18,

1991. (*Id.* ¶¶ 15, 19.) One of the tracks on the album, *The Fly*, was pre-released as a single recording on October 21, 1991. (*Id.*) U2 registered a copyright in *The Fly* in 1991. See Exhibit B to the Munkittrick Decl.<sup>2</sup>

Over a quarter century later, Plaintiff filed his complaint, alleging that *The Fly* is substantially similar to *Nae Slappin* and infringes Plaintiff’s copyright. (FAC ¶¶ 30–38, 49–51.) Specifically, Plaintiff alleges the following similarities between *Nae Slappin* and *The Fly*:

- a. An “elaborate and distinctive guitar solo” in *The Fly* is “nearly identical to the one in Plaintiff’s Work;”
- b. “The guitar hook in the songs is the same;”
- c. “The percussion in ‘The Fly’ accentuates the same points in the bass line as in Plaintiff’s Work”; and
- d. “The dimensions of sound of the songs are substantially similar or literal in specific fragments.”

(FAC ¶ 20.) Plaintiff also submitted as Exhibit A to the FAC a one-track audio CD containing a manufactured mash-up of five- to fifteen-second snippets from the two works. (*Id.* ¶ 24.)

Plaintiff alleges the following similarities regarding those snippets:

- i) A guitar solo that is “reproduced, virtually note-for-note, and with identical backing,” (FAC ¶ 25 (citing Ex. A at 0:05-0:31 (“Clip 1”)));
- ii) A “tambourine present in both tracks” that “reinforces the beat of both songs in a similar way,” (*id.* (citing Clip 1));
- iii) The “drum and percussion, and the bass line, is the same at points in both songs,” (*id.* (citing Clip 1)); and
- iv) The “first chord change,” from “E7 to A7,” in *Nae Slappin*, is allegedly “reflected” in the bass and lead guitar in *The Fly*. (*Id.* (citing Ex. A at 1:08-1:22).)

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<sup>2</sup> The Court may take judicial notice of this copyright registration. See, e.g., *Island Software & Comput. Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 261 (2d Cir. 2005) (“The district court was entitled to take judicial notice of Microsoft’s federal copyright registrations, as published in the Copyright Office’s registry.”); *Hutson v. Notorious B.I.G., LLC*, No. 14-cv-2307 (RJS), 2015 WL 9450623, at \*3 (S.D.N.Y. Dec. 22, 2015) (taking judicial notice of the copyright registration of a musical composition on a motion to dismiss).

The Defendants submitted full recordings of *Nae Slappin* and *The Fly* to the Court in connection with their motion to dismiss the original complaint, and the recordings are part of the record. Dkt. 21-2 (Exhibit B to the May 9, 2017 Declaration of David A. Munkittrick); Dkt. 25 (Order directing the Audio CD be included in the record).<sup>3</sup>

Plaintiff asserts claims for direct copyright infringement (Count I), contributory and vicarious copyright infringement (Count II), and equitable relief in the form of inclusion as a writer of *The Fly* (Count III). Because Counts II and III are dependent on first establishing direct infringement, the FAC should be dismissed in its entirety if the Court finds, as argued below, that, as a matter of law, there is no substantial similarity between the works. *See Arista Records, LLC v. Doe 3*, 604 F.3d 110, 117 (2d Cir. 2010). Count III is also time-barred, and is subject to dismissal on that independent basis.

#### **STANDARD OF REVIEW**

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff's complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). By contrast, a pleading that only "offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). Indeed, such conclusory statements "are not entitled to the assumption of truth." *Id.* at 679. Likewise, the requirement to draw all inferences in plaintiff's favor is "inapplicable to legal conclusions." *Id.* at 678; *see also Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012), *cert.*

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<sup>3</sup> Even where the plaintiff has not provided copies of the works at issue in a copyright infringement case, a district court may nonetheless consider them in evaluating a motion to dismiss because they were "clearly relied on by [p]laintiffs in commencing suit." *Edwards v. Raymond*, 22 F. Supp. 3d 293, 297 (S.D.N.Y. 2014) (Cote, J.); *Pyatt v. Raymond*, No. 10-cv-8764 (CM), 2011 WL 2078531, at \*5 (S.D.N.Y. May 19, 2011), *aff'd*, 462 F. App'x 22 (2d Cir. 2012) (citing *Rothman v. Gregor*, 220 F.3d 81, 88–89 (2d Cir. 2000)).

*denied sub nom. Curtis Circulation Co. v. Anderson News LLC*, 133 S. Ct. 846 (2013).

Moreover, in a copyright infringement action, a plaintiff's allegations are accepted as true only to the extent that they are consistent with the works themselves. *See Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010). "In copyright infringement actions, the works themselves supersede and control contrary descriptions of them, including any contrary allegations, conclusions or descriptions of the works contained in the pleadings." *Id.* (citations omitted).

## ARGUMENT

### **I. No Reasonable Jury Listening to the Works as a Whole Could Find *The Fly* Substantially Similar to *Nae Slappin*.**

To make out a claim for copyright infringement, the allegedly infringing work must be "substantially similar" to "protectable" material in the original work. *See Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 101 (2d Cir. 2014). The touchstone is substantial similarity, and any similarity must in fact be "substantial." *See, e.g., Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 632 (S.D.N.Y. 2008); *see also Bell v. Blaze Magazine*, No. 99-cv-12342 (RCC), 2001 WL 262718, at \*3-4 (S.D.N.Y. Mar. 16, 2001).

Works are substantially similar if an "ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal as the same." *Fulks v. Knowles-Carter*, 207 F. Supp. 3d 274, 278 (S.D.N.Y. 2016) (quoting *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 111 (2d Cir. 2001)). The primary question under this standard is whether "an average lay observer would [] recognize the alleged copy as having been appropriated from the copyrighted work." *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995) (quoting *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 766 (2d Cir. 1991)); *see also Pyatt*, 2011 WL 2078531, at \*4. "In the context of a case alleging music

plagiarism,” the analysis is refined to whether “defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.” *Edwards*, 22 F. Supp. 3d at 298 (quoting *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997)).

This requires courts to listen to and compare the works as a whole – to “compare the contested [work’s] total concept and overall feel with that of the allegedly infringed work ... as instructed by our good [ears] and common sense.” *Fulks*, 207 F. Supp. 3d at 279 (quoting *Peter F. Gaito Architecture, LLC*, 602 F.3d at 66). This inquiry looks to the total concept and overall feel of the works – as an ordinary observer would listen to them – not to dissected elements or snippets. *See id.*; *see also Boone v. Jackson*, No. 03-cv-8661 (GBD), 2005 WL 1560511, at \*3 (S.D.N.Y. July 1, 2005) (“When determining ‘substantial similarity,’ the finder of fact is constrained to look at the work as a whole, without dissection as an ordinary lay observer would.”), *aff’d on other grounds*, 206 F. App’x 30 (2d Cir. 2006).

The comparison of the works’ total concept and feel and determination of substantial similarity can be made as a matter of law at the pleadings stage. *Edwards*, 22 F. Supp. 3d at 298 (citing *Peter F. Gaito Architecture*, 602 F.3d at 64); *see also Warner Bros. Inc. v. Am. Broad. Cos., Inc.*, 720 F.2d 231, 240 (2d Cir. 1983). Indeed, this Court and others in this Circuit have time and again dismissed copyright infringement actions for lack of substantial similarity as a matter of law. *E.g.*, *McDonald v. West*, 138 F. Supp. 3d 448, 458, 461 (S.D.N.Y. 2015) (granting motion to dismiss after listening to the two songs), *aff’d*, 669 F. App’x 59 (2d Cir. 2016); *TufAmerica, Inc. v. WB Music Corp.*, 67 F. Supp. 3d 590 (S.D.N.Y. 2014); *Edwards*, 22

F. Supp. 3d at 302; *Pyatt*, 2011 WL 2078531 at \*10.<sup>4</sup>

Here, listening to the songs as a whole, one after the other, makes clear that there is no substantial similarity between the two. Their “total concept and overall feel” is entirely different, as is their “aesthetic appeal.” *Nae Slappin* is essentially an extended guitar solo consisting mostly of multiple guitar tracks, with percussion accompaniment. There are no vocals, no lyrics, no subject, and no theme. *The Fly* is a different animal entirely. It is a “song” in the true sense of the word, with everything that comes with it: vocals, lyrics, a subject, and a theme. As Plaintiff himself puts it, “‘The Fly’ is a direct reference to ‘The Metamorphosis’ by Franz Kafka, in which the protagonist changes overnight from a travelling salesman into a giant insect, or fly.” (FAC ¶ 18.)

This difference is even more fundamental than a “material difference[.]” that this Court noted in *Edwards*. 22 F. Supp. 3d at 301. There, the Court observed that “Plaintiffs’ Song is in significant part a rap song [while] the Challenged Song has no rapping; Usher sings all of the lyrics.” *Id.*; see also *McDonald*, 138 F. Supp. 3d at 460 (noting differences in vocals). Here, the difference is not just in the manner the lyrics are vocally delivered, but in the very existence of lyrics, vocals, and a melody. Accordingly, it is impossible that any of the concept, feel, or aesthetics flowing from the vocals in *The Fly* – a central component of the song – could be substantially similar to *Nae Slappin*. This in itself rules out any similarity (much less substantial similarity) in total concept and feel.

Indeed, the overall concept and feel of the two works are entirely different. *Nae Slappin*

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<sup>4</sup> See also, e.g., *DiTocco v. Riordan*, 496 F. App’x 126, 128 (2d Cir. 2012); *Peter F. Gaito Architecture*, 602 F.3d at 6; *Fulks*, 207 F. Supp. 3d at 293; *Currin v. Arista Records, Inc.*, 724 F. Supp. 2d 286, 294 (D. Conn. 2010) (“The court, having carefully listened to the songs and reviewed the record, finds that the total concept and feel of the two songs is very different.”); *Boone*, 2005 WL 1560511, at \*4 (S.D.N.Y. 2005) (noting on summary judgment, “The two songs do not sound alike.”); *Allen v. Scholastic Inc.*, 739 F. Supp. 2d 642, 665 (S.D.N.Y. 2011); *Telebrands Corp. v. Del Labs., Inc.*, 719 F. Supp. 2d 286, 294 (S.D.N.Y. 2010).

is experimental and improvisatory, exploring different shades, effects, sounds, and techniques on the guitar. It acts as a vehicle for Plaintiff to showcase the different sounds and effects he can produce on a guitar and how he can weave multiple guitar leads together. There is little structure in *Nae Slappin*, in that there is no recognizable theme or chorus – no “hook” that the ordinary listener could walk away humming. After cycling through various improvisatory ideas, *Nae Slappin* ends in what can only be described as noise, which simply cuts out abruptly.

In contrast, *The Fly* follows a more traditional song structure with a chorus and verses. *See also McDonald*, 138 F. Supp. 3d at 460 (finding no substantial similarity and noting that one song was “clearly divided between verse and chorus” while the other was not). Unlike *Nae Slappin*, *The Fly* has a hummable chorus. The chorus enters as a distinct contrast from the sound the Band employed in the verses. The chorus in a way creates a sense of clouds parting, revealing a ray of clarity piercing the gritty, more abrasive sound that surrounds it in the verses. Each time the chorus appears,<sup>5</sup> the guitar drops out, a falsetto vocal line enters, and Bono sings a variation of the lyrics:

*A man will beg  
A man will crawl  
On the sheer face of love  
Like a fly on a wall  
It's no secret at all*

The song does not conclude in noise as *Nae Slappin* does but rather ends on a single guitar note and a cymbal roll.

There are differences in the details as well. The opening guitar riff in *The Fly*, which returns at 0:49, uses a different, more raw sound than in *Nae Slappin*. The guitar at the beginning of *Nae Slappin*, in contrast, is cleaner and clearer, with more precise articulations. At 0:45 of Track 1 of Dkt. 21-2, and again at 2:53, the guitar in *Nae Slappin* devolves into

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<sup>5</sup> The first iteration of the chorus begins at 1:07 of Track 2 of Dkt. 21-2, and it returns at 1:51 and 3:24.

electronic sounds and whines, sounding at times like whale song, at others like a revving engine, and at others almost pitch-less. None of these effects is heard in *The Fly*. While the percussion in *The Fly* utilizes a rhythmic cowbell throughout, there is no cowbell or anything of the like in *Nae Slappin*.

Because the songs are so patently dissimilar, there is no need to consult written sheet music. “What is required is only a ... comparison of the works.” *Fulks*, 207 F. Supp. 3d at 279. While words cannot do the differences between the songs justice, it is critical to note the number, breadth, and pervasiveness of the differences. “As a matter of logic as well as law, the more numerous the differences between two works the less likely it is that they will create the same aesthetic impact so that one will appear to have been appropriated from the other.” *Id.* at 281 (quoting *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 913 (2d Cir. 1980)). Here, the differences are so numerous, so stark, and so fundamental that the “difference in overall concept and feel ... overwhelms any superficial similarities.” *Id.* at 292.

As in *McDonald*, “[l]istening to the two tracks side by side demonstrates beyond dispute how little they have in common.” 138 F. Supp. 3d at 460. And, as this Court found in *Edwards*,

Because of these differences, the ‘total concept and overall feel’ of the music in the two songs are different, and an average observer would not find that the Defendants have taken ‘from Plaintiffs’ works so much of what is pleasing to the ears of lay listeners ... that Defendants wrongfully appropriated something which belongs to the Plaintiffs.’

22 F. Supp. 3d at 301. The same conclusion is appropriate here.

## **II. The FAC Fails to Allege Any Similarity of Protectable Expression.**

The lack of similarity on listening to the two songs at issue is sufficient reason to dismiss the FAC. However, the FAC may also be dismissed for its failure to allege similarity in *protectable* expression. *See Edwards*, 22 F. Supp. 3d at 299; *see also Peter F. Gaito Architecture*, 602 F.3d at 63; 17 U.S.C. § 102(b) (“In no case does copyright protection



... extend to any idea ... [or] concept ... regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). Here, given that the works sound nothing alike, it is no surprise that the FAC fails to make any cognizable allegation of similarity in protectable expression.

Mere allegations of copying are insufficient to state a claim because not all similarities amount to copyright infringement. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Accordingly, “[i]t is critical to bear in mind what does not amount to infringement under the Copyright Act.” *Fulks*, 207 F. Supp. 3d at 279 (quoting *Croak v. Saatchi & Saatchi, N. Am., Inc.*, No. 15-cv-7201 (JSR), 2016 U.S. Dist. LEXIS 44350, at \*3 (S.D.N.Y. 2016)). A complaint that alleges only similarity in ideas, rather than the expression of ideas, will not suffice. *Edwards*, 22 F. Supp. 3d at 299. Thus, “a court must decide whether the similarities shared by the works are something more than mere generalized idea or themes.” *Id.* at 298 (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48-49 (2d Cir. 1986)).

Alleged similarities can be “so general that they rise to the level of unprotected ideas.” *Fulks*, 207 F. Supp. 3d at 281. Similarly, “copyright does not protect styles, but only particular original expressions of those styles.” *McDonald*, 138 F. Supp. 3d at 455. In music, “the basic building blocks of music, including tempo and individual notes” do not rise to the level of protectable expression, and neither do “common rhythms, song structures, and harmonic progressions.” *Id.* at 454. And of course, “bare legal conclusion[s]” cannot support an allegation of substantial similarity. *Edwards*, 22 F. Supp. 3d at 300.

Paragraphs 20, 21, and 25 of the FAC encompass the totality of Plaintiff’s allegations of similarity. These paragraphs contain no cognizable allegation of substantial similarity in protectable expression.

**A. The FAC Does Not Plausibly Allege Substantial Similarity of Protectable Expression in a “Guitar Solo” or “Guitar Hook”**

Plaintiff makes claims regarding a guitar solo: that *The Fly* “features an elaborate and distinctive guitar solo” that is “nearly identical,” “virtually note-for-note,” and with “identical backing” as *Nae Slappin*. (FAC ¶¶ 20(a), 25(i)). In making these allegations, Plaintiff points to a 7-second clip from *Nae Slappin* and a 12-second clip from *The Fly*. (FAC Ex. A (Clip 1)).<sup>6</sup> The *Nae Slappin* clip is a 6-note phrase taken from the beginning of the song, while the clip from *The Fly* is a series of 4-note phrases taken from about two-thirds of the way through the song.

This is not proper analysis under copyright law and should not be considered. The law is clear that substantial similarity cannot be shown by an “analysis which alters the actual sequence or construction of plaintiffs’ work in order to achieve the juxtaposition that makes for greater similarity with defendants’ work.” *Warner Bros. Inc. v. Am. Broad. Cos., Inc.*, 654 F.2d 204, 211 (2d Cir. 1981); *Boone*, 2005 WL 1560511, at \*3 (S.D.N.Y. July 1, 2005) (“When determining ‘substantial similarity,’ the finder of fact is constrained to look at the work as a whole, without dissection as an ordinary lay observer would.”); *see also Fulks*, 207 F. Supp. 3d at 279; *Williams v. Broadus*, No. 99-cv-10957 (MBM), 2001 WL 984714, at \*4 (S.D.N.Y. Aug. 27, 2001) (finding it “improper[ to] alter the actual sequence or construction of [the work] to achieve a juxtaposition that makes for greater similarity ... than would exist if the two works were compared in their totality”); *Francescatti v. Germanotta*, No. 11-cv-5270, 2014 WL 2767231, at \*13 (N.D. Ill. June 17, 2014) (“We may not compare the melodies in their altered

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<sup>6</sup> Seven seconds is about 3 percent of *Nae Slappin*, and 12 seconds is about 4 percent of *The Fly*. Such a *de minimis* portion of the songs cannot constitute substantial similarity between the works as a whole. *See, e.g., TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 605 (S.D.N.Y. 2013) (granting motion to dismiss on *de minimis* grounds where alleged copying was for “three seconds of the 5:59 minute long song”); *Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 632 (S.D.N.Y. 2008) (dismissing infringement claim on *de minimis* grounds where alleged copying was “for no more than a few seconds at a time”); *see also Jean v. Bug Music, Inc.*, 2002 U.S. Dist. LEXIS 3176, at \*2 (S.D.N.Y. Feb. 25, 2002) (finding a three-note phrase was “only a *de minimis* portion of the songs”).

states.”). Plaintiff’s splicing of disparate parts of the two works has no role in the substantial similarity determination, which requires a comparison of the total concept and overall feel of the works as a whole.

Furthermore, Plaintiff’s guitar-solo assertions remain plagued by vague and conclusory allegations. As an initial matter, Plaintiff’s *entire* work is an extended guitar solo. In effect, then, the guitar solo allegations are nothing more than a conclusory claim that *Nae Slappin* is substantially similar to *The Fly*. Furthermore, the FAC does not identify what the claimed “identical backing” is. Nor can a few shared notes in a short phrase constitute substantial similarity. *See Allen*, 2009 U.S. Dist. LEXIS 63001, at \*35-36 (holding that a three-note phrase was “unprotectable as a matter of law” because there was no legal authority “to consider that the location of a single, common three-note sequence in a musical composition is sufficient to support a finding of protectability”). After all, there are only seven notes in the traditional Western scale. If a musician could claim a monopoly on any three- or four-note sequence, there would soon be few sequences left to write. *See id.* at \*33 (“In analyzing musical compositions, the court is ‘mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions, especially in popular music.’”); *see also Selle v. Gibb*, 741 F.2d 896, 905 (7th Cir. 1984) (observing that “popular music” is a field “in which all songs are relatively short and tend to build on or repeat a basic theme”).

More fundamentally, however, it bears repeating that extracting small snippets from the works does not “address the underlying issue: whether a lay observer would consider the works as a whole substantially similar to one another.” *Williams v. Crichton*, 84 F.3d 581, 590 (2d Cir. 1996); *see also Le Moine v. Combined Commc’ns Corp.*, No. 95-cv-5881, 1996 WL 332688, at

\*6 (N.D. Ill. June 13, 1996) (finding no substantial similarity where “the similar appearance of the two works stems only from the individual elements they share, not from a substantially similar total concept and feel arising from the creative arrangement and interaction of common elements”). Plaintiff’s small, manufactured snippets and “guitar solo” allegations do not meet his pleading burden.

Plaintiff also claims that “the guitar hook in the songs is the same” – whatever he considers the “guitar hook” to be. (FAC ¶ 20(b).) This too is a bare legal conclusion that at best rises to the level of an unprotected idea. *See Edwards*, 22 F. Supp. 3d at 300 (discounting as a “bare legal conclusion” an allegation that “the theme, melody, hook, lyrics, and chorus of the musical compositions are substantially similar”); *Fulks*, 207 F. Supp. 3d at 281.

**B. The FAC Does Not Plausibly Allege Substantial Similarity of Protectable Expression in “Percussion” or a “Beat”**

Plaintiff asserts claims regarding percussion and rhythm: that “the percussion in ‘The Fly’ accentuates the same points in the bass line as in Plaintiff’s Work” (FAC ¶ 19(b)); a tambourine “reinforces the beat of both songs in a similar way” (*id.* ¶ 25(ii)); and the “drum and percussion, and the base line, is the same at points in both songs.” (*Id.* ¶ 25(iii).)<sup>7</sup> These allegations, too, allege only unprotected ideas. Further, the references to Clip 1, which does not meaningfully clarify or expand on these vague allegations, do not make these unprotectable ideas protectable. Like the allegation of a similar “shuffling percussion” in *McDonald*, Plaintiff’s percussion and beat allegations are “too vague” and “simply describe[] a rhythm’s style or general feel, both uncopyrightable.” 138 F. Supp. 3d at 458. Accenting beats alone “is too basic and commonplace a musical technique to be protectable.” *Id.*; *see also Tisi v. Patrick*, 97 F.

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<sup>7</sup> Plaintiff cites to his Exhibit A in connection to these claims. Even if listening to the manufactured clips was appropriate – which it is not – the alleged percussion and rhythm similarities are not apparent in the clips, and certainly are not to the ordinary observer.

Supp. 2d 539, 549 (S.D.N.Y. 2000) (finding “there is nothing unusual about ... the rhythm of [the song], ... or the so-called ‘adult contemporary’ style of his song ....”); *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 282 (S.D.N.Y. 1991) (finding that “a recurring eighth note rhythm” was a “common element” and, thus is, “unoriginal and constitute[s] ... ordinary, unprotectable expression”). Similarly, there is nothing unique or original to Plaintiff’s song in using a tambourine. Plaintiff cannot claim a monopoly over the use of a tambourine to reinforce a beat, as such use is ubiquitous. In any event, the tambourine is used entirely differently in the two songs. In *Nae Slappin*, the tambourine is hit along with the snare, whereas in *The Fly*, the tambourine is shaken.

**C. The FAC Does Not Plausibly Allege Substantial Similarity of Protectable Expression in a “Chord Change”**

According to Plaintiff, there is a “chord change” from “E7 to A7” in both works. (FAC ¶ 25(iv).) This is not something the ordinary listener hears. No layperson hears a song and identifies E7 to A7 chord changes. Thus, the excerpt in Plaintiff’s Ex. A sheds no light on his chord change allegation. Even if this allegation could be germane to the substantial similarity analysis before the Court, such a chord progression (I<sup>7</sup> to IV<sup>7</sup> in the key of E) is common and cannot be original expression. *See Tisi*, 97 F. Supp. 2d at 549 (finding “nothing unusual about the key of A major, [or] a ‘I-IV’ chord progression...”); *Intersong-USA*, 757 F. Supp. at 282 (finding general similarities, including the use of a “descending scale step motive, ... structure patterns, their use of a certain harmonic progression and a recurring eighth note rhythm,” to be “common compositional techniques,” even the combination of which is not protectable as they are “found in many other well-known songs.”). Just as Plaintiff has no monopoly over the use of a tambourine, he cannot preclude others from moving to an A7 chord from an E7 chord. The

chord change allegation therefore describes expression unprotectable under the copyright laws and irrelevant to the ordinary observer test.

**D. The FAC Does Not Plausibly Allege Substantial Similarity of Protectable Expression in “Dimensions of Sound”**

Plaintiff claims that “the dimensions of sound of the songs are substantially similar or literal in specific fragments.” (FAC ¶ 20(d).) This does not state a copyright infringement claim. Alleging a similarity in “dimensions of sound,” “fails because feel and tone are akin to style – they are too close to ideas to be copyrighted in the abstract.” *McDonald*, 138 F. Supp. 3d at 458. Furthermore, Plaintiff does not even identify the “specific fragments” to which this allegation is directed.<sup>8</sup>

With that, Plaintiff is left with nothing but bare legal conclusions. He alleges that “an ordinary lay observer would reasonably find that the songs are substantially similar” and that “the similarities ... are strikingly similar.” (FAC ¶ 21.) These claims simply restate legal standards, and are thus pure legal conclusions that allege no facts whatsoever. As such, they should be given “no effect.” *Anderson News, LLC*, 680 F.3d at 185; *see also Edwards*, 22 F. Supp. 3d at 300.

In the end, because the songs sound nothing alike, it is unsurprising that the FAC contains no cognizable allegations of substantial similarity in protectable expression. The FAC should accordingly be dismissed in its entirety.

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<sup>8</sup> The reference in FAC ¶ 23 to a journalist’s assessment of the works is as unpersuasive as Plaintiff’s own claims of similarity. In any event, a journalist analyzing songs in order to sell an article is not setting out to determine whether “defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners ... that defendant wrongfully appropriated something which belongs to the plaintiff,” the copyright analysis applicable here. *Edwards*, 22 F. Supp. 3d at 298.

### **III. Plaintiff's Equitable Relief / Right of Attribution Claim Is Time-Barred**

Plaintiff's equitable relief and right of attribution claim fails because his infringement claim fails. The claim also suffers from numerous additional infirmities.

Plaintiff concedes that the right of attribution "is not statutorily recognized." (FAC ¶ 49(a).) Indeed, there is no right of attribution under U.S. Copyright law outside the visual art context. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) (explaining that the "express right of attribution is carefully limited and focused, ... attach[ing] only to specified 'work[s] of visual art'"); *see also* 17 U.S.C. § 106A ("only the author of a work of visual art has the rights [of attribution] conferred by subsection (a)").

If that were not enough, Plaintiff's attribution and writing credit claim does not make it out of the gate, because it is at core a claim for ownership in the copyright of *The Fly* and is thus subject to a three-year statute of limitations. 17 U.S.C. § 507(b) ("No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued."). "Plaintiffs claiming to be co-authors are time-barred three years after accrual of their claim from seeking a declaration of copyright co-ownership rights and any remedies that would flow from such a declaration." *Merchant v. Levy*, 92 F.3d 51, 56 (2d Cir.1996).

The statute of limitations operates to "promote[] the principles of repose integral to a properly functioning copyright market." *Wilson v. Dynatone Publ'g Co.*, No. 16-cv-104 (PAE), 2017 WL 1330336, at \*5 (S.D.N.Y. Apr. 10, 2017) (citing *Merchant*, 92 F.3d at 56–57); *see also Netzer v. Continuity Graphic Assocs., Inc.*, 963 F. Supp. 1308, 1318 (S.D.N.Y. 1997) ("Statutes of limitations ... protect important social interests in certainty, accuracy, and repose .... This is especially true in the area of copyright, where certainty and repose are essential to the functioning of the copyright market."). Participants in the copyright market are entitled to rely

on statements made in copyright registrations, and on the certainty that any ownership disputes will be raised within three years. *See* 17 U.S.C. § 507(b); *id.* § 410(c) (providing that a certificate of registration “shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate”). In the end, this “serves ... to enrich the general public through access to creative works.” *Netzer*, 963 F. Supp. at 1318 (“It is inequitable to allow the putative co-owner to lie in the weeds for years after his claim has been repudiated while large amounts of money are spent developing a market for the copyrighted material.”) (citations omitted).

An ownership claim accrues “only once, when a reasonably diligent plaintiff would have been put on inquiry [notice] as to the existence of a right.” *Kwan v. Schlein*, 634 F.3d 224, 228 (2d Cir. 2011) (quoting *Stone v. Williams*, 970 F.2d 1043, 1048 (2d Cir. 1992)). As an initial matter, “a co-author knows that he or she jointly created a work from the moment of its creation.” *Merchant*, 92 F.3d at 56. The act of creation with no resulting royalties alone put Plaintiff on notice of his claim. Plaintiff’s allegations further demonstrate that he was on inquiry notice of his ownership claim when *The Fly* was released and registered with the Copyright Office in 1991.

As Plaintiff notes, *The Fly* reached the top of the UK Singles chart, number one in Ireland and Australia, and number 61 in the United States. (FAC ¶ 19.) This widespread exposure of the song put or should have put Plaintiff on notice of any ownership claim (though he has none), yet he took no action. *See, e.g., Brand v. RMM*, No. 10-cv-0287 (AJP), 2011 WL 1496344, at \*4 (S.D.N.Y. Apr. 18, 2011) (given history of public distribution without receiving royalties, finding plaintiff “reasonably should have know[n] of the injury upon which his claim is premised ....”); *Weber v. Geffen Records, Inc.*, 63 F. Supp. 2d 458, 465 (S.D.N.Y. 1999) (finding on a



motion to dismiss, where work was widely distributed without receipt of royalties, “a reasonably diligent person ... would have looked at the ... copyright registration [to see] who was credited as an author ....”).

Additionally, the 1991 copyright registration of *The Fly* gave Plaintiff notice that U2 asserted sole copyright ownership rights in *The Fly*. See Munkittrick Decl. Ex. B; 17 U.S.C. § 205(c) (“Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document.”); see also *Mahan v. Roc Nation, LLC*, No. 14-cv-5075 (LGS), 2015 WL 1782095, at \*3 (S.D.N.Y. Apr. 15, 2015) (“Plaintiff’s claims are time barred as a result of ... registrations with the United States Copyright Office.”), *aff’d*, 634 F. App’x 329 (2d Cir. 2016); *Ortiz v. Guitan Bros. Music Inc.*, No. 07-cv-3897, 2008 WL 4449314, at \*4 (S.D.N.Y. Sept. 29, 2008) (“Defendants’ act of registration should have put Ortiz on notice of his claim.”); *Margo v. Weiss*, No. 96-cv-3842 (MBM), 1998 WL 2558, at \*5 (S.D.N.Y. Jan. 5, 1998) (finding ownership claim accrued “in 1961, the year in which the song was written and the copyright certificate listing the lyricists as authors was filed”), *aff’d*, 213 F.3d 55 (2d Cir. 2000).

Plaintiff has no valid excuse for failing to timely assert his ownership claim, and the three-year period to bring a copyright ownership claim expired over two decades ago in 1994. In addition to being subject to dismissal because *The Fly* does not reflect any creative input from Plaintiff, Plaintiff’s equitable relief and right of attribution claim (Count III) should be dismissed as time-barred.

### **CONCLUSION**

For the foregoing reasons, Plaintiff’s First Amended Complaint should be dismissed with prejudice and without leave to replead.

Dated: July 18, 2017

Respectfully submitted,

By: /s/ Brendan J. O'Rourke

Brendan J. O'Rourke

Sandra A. Crawshaw-Sparks

David A. Munkittrick

Tiffany M. Woo

PROSKAUER ROSE LLP

Eleven Times Square

New York, NY 10036-8299

Tel.: (212) 969-3000

borourke@proskauer.com

scrawshaw@proskauer.com

dmunkittrick@proskauer.com

twoo@proskauer.com

*Attorneys for Defendants*