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17 Attorneys for Defendants

18 UNITED STATES DISTRICT COURT

19 CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

20 MARCUS GRAY (p/k/a FLAME), et  
al.,

21 Plaintiffs,

22 v.

23 KATHERYN ELIZABETH HUDSON  
24 (p/k/a KATY PERRY), et al.,

25 Defendants.

CASE NO. 2:15-cv-05642-CAS (JCx)

Honorable Christina A. Snyder

**DEFENDANTS’ NOTICE OF  
MOTION AND MOTION FOR  
MOTION FOR JUDGMENT AS A  
MATTER OF LAW OR,  
ALTERNATIVELY, FOR A NEW  
TRIAL**

Date: January 27, 2020  
Time: 10:00 a.m.  
Ctrm: 8D—8th Fl., First Street

Filed: July 1, 2014  
Trial: July 17, 2019

28 Mitchell

1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

3 **PLEASE TAKE NOTICE THAT** on January 27, 2020, in Courtroom 8D  
4 of the Federal Courthouse located at 350 West 1<sup>st</sup> Street, Los Angeles, CA 90012,  
5 Defendants Capitol Records, LLC, Jordan Houston, Lukasz Gottwald, Sarah  
6 Theresa Hudson, Karl Martin Sandberg, Henry Russell Walter, WB Music Corp.,  
7 Kobalt Music Publishing America, Inc., Kasz Money, Inc., and Katheryn Elizabeth  
8 Hudson (collectively “Defendants”) will and hereby do move pursuant to Rule  
9 50(b) of the Federal Rules of Civil Procedure for judgment as a matter of law on  
10 the single claim for copyright infringement brought by Plaintiffs Marcus Gray,  
11 Chike Ojukwu, and Emanuel Lambert against all Defendants, or in the alternative,  
12 for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure.

13  
14 The motion for judgment as a matter of law is made on the following  
15 grounds:

16  
17 *First*, no legally sufficient evidentiary basis supports the jury’s finding that  
18 “Dark Horse” is substantially similar to “Joyful Noise” in original, protectable  
19 expression. The only claimed similarities between the two works are a small  
20 number of indisputably commonplace elements in the works’ ostinatos and the  
21 undisputed evidence at trial established the many differences between both the  
22 ostinatos and the works as a whole. As such, the proper application of the extrinsic  
23 and intrinsic tests to these facts requires a finding of no substantial similarity.

24  
25 *Second*, no legally sufficient evidentiary basis supports the jury’s finding  
26 that Plaintiffs have sustained their burden of proving access to “Joyful Noise” by  
27 the relevant authors of “Dark Horse” (Walter and Gottwald) prior to creation of the  
28 allegedly infringing portion of “Dark Horse.” Plaintiffs did not present any direct

1 evidence of access or circumstantial evidence of a chain of events linking “Joyful  
2 Noise” to the relevant authors of “Dark Horse.” Nor did Plaintiffs present  
3 sufficient evidence of widespread dissemination of “Joyful Noise” that would give  
4 rise to a reasonable opportunity to hear “Joyful Noise.” Further, the  
5 uncontroverted evidence proved that, whatever the reach of “Joyful Noise,” neither  
6 Walter nor Gottwald (or any other defendant author) availed himself of the  
7 opportunity to hear “Joyful Noise.”

8  
9 *Third*, no legally sufficient evidentiary basis supports the jury’s finding  
10 against Defendants on the grounds that Defendants presented un rebutted and  
11 unimpeached evidence at trial demonstrating that all of the authors of “Dark  
12 Horse” independently created the composition.

13  
14 *Fourth*, no legally sufficient evidentiary basis supports the jury’s finding that  
15 Plaintiffs’ copyright registration in “Joyful Noise” protects the instrumental beat  
16 created by Chike Ojukwu, which includes the allegedly infringed portion of  
17 “Joyful Noise.” This is because “Joyful Noise” is a derivative work of that beat  
18 and not a work of joint authorship. Plaintiffs lack a copyright registration for  
19 Ojukwu’s beat itself.

20  
21 *Fifth*, if the Court does not grant judgment as a matter of law as to all  
22 Defendants, judgment should still be granted as a matter of law as to the following  
23 Defendants: Kobalt Music Publishing America, Inc., WB Music Corp., Kasz  
24 Money, Inc., Katheryn Hudson, Lukasz Gottwald, Sarah Hudson, Karl Martin  
25 Sandberg, and Jordan Houston on grounds that Plaintiffs presented no evidence  
26 that any of these defendants infringed Plaintiffs’ exclusive rights under the  
27 Copyright Act. Moreover, Plaintiffs have no claim for vicarious liability or  
28 contributory infringement.

1           *Sixth*, even if the Court does not grant judgment as a matter of in favor of  
2 Defendants on liability, no legally sufficient evidentiary basis supports the jury’s  
3 finding that 22.5% of the net profit earned by each Defendant from “Dark Horse”  
4 was attributable to the use of the “Joyful Noise” musical composition in Ostinato 2  
5 in “Dark Horse” as opposed to other factors. Plaintiffs failed to satisfy their  
6 burden to prove Defendants’ gross revenue *attributable* to the infringement (i.e., a  
7 causal link). Defendants presented the un rebutted testimony of two expert  
8 witnesses who testified about the insignificance of Ostinato 2 to the commercial  
9 success and profits of “Dark Horse” and *Prism*. Plaintiffs did not present their own  
10 experts, or any other apportionment evidence.

11  
12           *Seventh*, no legally sufficient evidentiary basis exists to support the jury’s  
13 decision to exclude Capitol Records’ overhead costs in calculating its net profit.  
14 As a matter of law, in accordance with this Court’s instructions and the un rebutted  
15 and unimpeached evidence presented by Capitol at trial, the jury should have  
16 deducted overhead and calculated Capitol’s net profit as equaling \$629,725.

17  
18           The motion for a new trial is made on the following grounds:

19  
20           *First*, for the reasons explained above, the jury’s findings of (i) substantial  
21 similarity, (ii) access, including that Gottwald or Walter availed themselves of the  
22 opportunity to hear “Joyful Noise,” (iii) that “Dark Horse” was not independently  
23 created, and (iv) that the inclusion of the Beat created by Ojukwu was part of a  
24 joint work of authorship were contrary to the weight of the evidence.

25  
26           *Second*, a new trial is warranted due to the misconduct at trial by Plaintiffs’  
27 counsel and witnesses. Plaintiffs’ musicologist Dr. Todd Tecker gave improper  
28 and highly prejudicial testimony that invaded the province of the jury and during

1 closing argument, Plaintiff’s counsel made knowingly false and highly prejudicial  
2 assertions warranting a new trial.

3

4 *Third*, in the event that the Court reached the jury’s damage award, it should  
5 find that the award is contrary to the clear weight of the evidence and excessive.  
6 As discussed above, as to Capitol, the jury wrongly ignored Capitol’s overhead in  
7 calculating Capitol’s profit. Second, as discussed above, nothing supports the  
8 jury’s conclusion that 22.5% of Defendant’s profits is attributable to the use of the  
9 “Joyful Noise” musical composition in Ostinato 2. As such, at a minimum, the  
10 Court should remit the amount of the damages awarded.

11

12 This Motion is and will be based upon this Notice of Motion and Motion;  
13 the accompanying Memorandum of Points and Authorities; the exhibits and trial  
14 testimony identified in this motion; all other relevant evidence introduced at trial;  
15 the pleadings and papers on file herein; any Reply and supporting pleadings and  
16 exhibits that may be filed in support; any oral argument that may be made; and  
17 upon such other or further material as may be presented at or before the hearing of  
18 this matter.

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