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 9

10 **UNITED STATES DISTRICT COURT**
 11 **CENTRAL DISTRICT OF CALIFORNIA**
 12 **WESTERN DIVISION**

13 GOOD MORNING TO YOU
 PRODUCTIONS CORP.; ROBERT
 14 SIEGEL; RUPA MARYA; and
 MAJAR PRODUCTIONS, LLC; On
 15 Behalf of Themselves and All Others
 Similarly Situated,

16 Plaintiffs,

17 v.

18 WARNER/CHAPPELL MUSIC, INC.,
 19 and SUMMY-BIRCHARD, INC.,

20 Defendants.
 21
 22

Lead Case No. CV 13-04460-GHK
 (MRWx)

DEFENDANTS' REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS SECOND
AMENDED CONSOLIDATED
CLASS ACTION COMPLAINT
AND/OR MOTION TO STRIKE
PLAINTIFFS' PROPOSED CLASS
DEFINITION

Date: September 30, 2013
 Time: 9:30 a.m.
 Courtroom: 650
 Judge: Hon. George H. King,
 Chief Judge

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1 **I. INTRODUCTION**

2 Much of Plaintiffs’ Opposition (“Opp.”) is devoted not to the issues that
3 matter on this Motion—in particular, whether 17 U.S.C. § 301(a), preempts the
4 state-law claims—but instead to repeating allegations that Plaintiffs say will prove
5 their copyright invalidity arguments on the merits. Plaintiffs devote several pages to
6 their allegations that Warner/Chappell’s federally registered copyrights to *Happy*
7 *Birthday to You* were invalid at registration because the lyrics to that song were not
8 original to the authors. Specifically, Plaintiffs allege, and argue at length in their
9 Opposition, that other people sang and wrote down those lyrics first, thus rendering
10 the lyrics unoriginal for purposes of Warner/Chappell’s copyright. *See* Opp. at 3-6,
11 8-9; SAC ¶¶ 94, 99 (alleging that *Happy Birthday to You* “contained no original
12 authorship”); *see generally* SAC ¶¶ 54-100 (Plaintiffs’ allegations regarding
13 purported lack of originality). Plaintiffs’ merits arguments are flatly wrong as a
14 matter of copyright law. “Originality” under copyright law means that the author
15 must not have copied the work from someone else. It does *not* mean that the work
16 has to be novel, as is required for patent protection. *Feist Publications, Inc. v. Rural*
17 *Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). Warner/Chappell’s certificates of
18 copyright registration, which will be in evidence at summary judgment, will provide
19 *prima facie* proof that the lyrics to *Happy Birthday to You* were original; Plaintiffs
20 will not have any evidence at summary judgment to rebut that presumption; and
21 Warner/Chappell will be entitled to summary judgment.

22 On this Motion, what matters is not the merits (or lack thereof) of Plaintiffs’
23 invalidity contentions, but instead whether § 301(a) applies and preempts Plaintiffs’
24 claims. The statute clearly does apply. *Happy Birthday to You* is “within the
25 subject matter of copyright as specified by sections 102 and 103” of the Copyright
26 Act, regardless of Plaintiffs’ claim that the work was not original to
27 Warner/Chappell’s predecessor and therefore was not validly copyrighted. 17
28 U.S.C. § 301(a). “The work(s) upon which a state law claim is based need only be

1 within the ‘subject matter’ of copyright; their actual *protection* thereunder is
2 irrelevant to a preemption analysis.” *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d
3 1129, 1189-90 (C.D. Cal. 2001). Plaintiffs cannot, and so do not, rebut any of
4 Warner/Chappell’s authority on this point. Moreover, Plaintiffs’ state-law claims
5 are equivalent to the federal rights under § 106, because those claims allege nothing
6 more than that Warner/Chappell licensed the copyright to a work that Plaintiffs
7 allege is in the public domain. Under well-established authority, the claims do not
8 become non-equivalent just because of the label attached to the claim. The
9 substance of the claims is what counts. Here, the substance of all the claims is that
10 Warner/Chappell’s copyright is invalid.

11 Because all of Plaintiffs’ state-law claims are preempted, the maximum
12 limitations period in this case is the Copyright Act’s three-year statute. 17 U.S.C.
13 § 507(b). And, because the limitations period is three years, Plaintiffs Majar and
14 Siegel have no timely claims even under federal law; those Plaintiffs must be
15 dismissed. Plaintiffs’ arguments for extending the limitations period are specious.
16 Plaintiffs argue that the Court should “borrow” a limitations period from state law.
17 Courts do not borrow a limitations period from state law where the federal statute
18 expressly provides a limitation period. Section 507(b) provides the three-year
19 limitations period for any action “maintained *under the provisions of this title* [17],”
20 as this case is. *Id.* (emphasis added). Nor can Plaintiffs avoid this result by
21 invoking “equitable tolling.” Plaintiffs did not, and cannot, allege any facts to
22 justify the application of that doctrine.

23 It is unnecessary for the Court to consider the pleading sufficiency of
24 Plaintiffs’ state law claims. Even if the Court does reach those issues, Plaintiffs
25 have failed to plead several of those claims (UCL, FAL and rescission, which is a
26 remedy, not a cause of action). Plaintiffs’ contrary arguments on these points do not
27 withstand scrutiny. Warner/Chappell’s Motion should be granted.

28

1 **II. THE COPYRIGHT ACT PREEMPTS ALL OF PLAINTIFFS' STATE-**
2 **LAW CLAIMS**

3 **A. The Subject Matter Prong of § 301(a) Is Satisfied Because *Happy***
4 ***Birthday to You* Is Within the Ambit of Copyright Protection**

5 The first requirement for preemption is that the work at issue “come within
6 the subject matter of copyright as specified by sections 102 and 103 [of Title 17].”
7 17 U.S.C. § 301(a). As anticipated in Warner/Chappell’s Motion, Plaintiffs’
8 overarching argument is that *Happy Birthday to You* is not “within the subject
9 matter of copyright” because Plaintiffs contend that the work is not copyrighted.
10 *Compare* Opp. at 6-9, with Mot. at 12-13. Plaintiffs’ argument fails because
11 § 301(a) may preempt a state-law claim *even if* the Copyright Act does not protect
12 the work. Warner/Chappell cited multiple federal appellate and district court
13 decisions, as well as the *Nimmer on Copyright* treatise, for this fundamental
14 proposition. *See* Mot. at 12-13.¹ Plaintiffs do not even discuss, much less attempt
15 to distinguish, any of these authorities. Nor do Plaintiffs cite a single case or treatise
16 supporting their unprecedented interpretation of § 301(a). Plaintiffs’ position is
17 meritless, and the Court should reject it.

18 Plaintiffs make two additional arguments on the “subject matter” prong, both
19 of which are wrong. *First*, Plaintiffs argue that Warner/Chappell’s copyright is not
20 “within the subject matter of copyright as specified by section[] 102,” 17 U.S.C.
21 § 301(a), because, when registered, the lyrics to *Happy Birthday to You* were not
22 “original works of authorship fixed in any tangible medium of expression,” *id.*
23 § 102(a). *See* Opp. at 8. Specifically, Plaintiffs allege that, because people other
24 than the authors on Warner/Chappell’s copyright registrations allegedly sang or

25 ¹ Citing *Barclays Capital Inc. v. TheFlyOnTheWall.Com, Inc.*, 650 F.3d 876, 892-93
26 (2d Cir. 2011); *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1211-13 (9th Cir.
27 1998); *NBA v. Motorola, Inc.*, 105 F.3d 841, 849 (2d Cir. 1997); *ProCD, Inc. v.*
28 *Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996); *Idema*, 162 F. Supp. 2d at 1189-90;
1 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 1.01[B][2], at 1-
67 to -68 (Matthew Bender, Rev. Ed.).

1 wrote down (*i.e.*, “fixed”) the lyrics “Happy Birthday to You, Happy Birthday to
2 You,” etc., years before 1935, the lyrics necessarily were not “original” when
3 registered. *See* Opp. at 8 (quoting SAC ¶¶ 38, 62). In essence, Plaintiffs’ theory is
4 that the lyrics to *Happy Birthday to You* were not novel at the time they were
5 registered in 1935, and therefore were not eligible for copyright protection. *Id.*²

6 Plaintiffs’ contention is based on a fundamental misunderstanding of the
7 Copyright Act and complete ignorance of controlling Supreme Court case law. In
8 copyright, “originality” means only “original to the author,” *i.e.*, not copied. *Feist*,
9 499 U.S. at 345. It “does *not* signify novelty,” as is required for patent protection.
10 *Id.* (emphasis added); *see also Nat’l Comics Publ’ns v. Fawcett Publ’ns*, 191 F.2d
11 594, 600 (2d Cir. 1951) (Hand, J.) (“a copyrighted ‘work,’ unlike a patent, demands
12 no ‘invention’”). “[A] work may be original even though it closely resembles other
13 works so long as the similarity is fortuitous, not the result of copying.” *Feist*, 499
14 U.S. at 345. The copyright registration certificates provide *prima facie* proof of the
15 originality of the lyrics, Plaintiffs will have no evidence to rebut the certificates, and
16 that will end Plaintiffs’ misbegotten quest for a declaration of invalidity. For
17 purposes of this Motion, the important point is that Plaintiffs are seeking a
18 declaratory judgment of invalidity (along with a declaratory order to have the money
19 they paid in license fees returned) based on a claim that the work did not meet the

21 ² Plaintiffs mischaracterize the allegations of their complaint and the actual
22 copyright registrations by suggesting that all six applications for copyright
23 protection that Summy filed in 1934 and 1935 were expressly limited to piano
24 arrangements, and did not include the lyrics to *Happy Birthday to You*. *See* Opp. at
25 8-9 (citing SAC ¶¶ 75-95). Plaintiffs try to use this characterization of the
26 registrations to suggest the Court must take as true a purported allegation that the
27 lyrics to *Happy Birthday to You* fall outside copyright protection because
28 Warner/Chappell’s predecessor never sought copyright protection for the lyrics.
That is not true, and more important for the context of this Motion, it is expressly
contradicted by the allegations in Plaintiffs’ own complaint. Plaintiffs expressly
allege in the SAC that in two of the six registrations—E51988 and E51990, both
from 1935—the lyrics “were included on the work registered with the Copyright
Office.” SAC ¶¶ 93, 98. Plaintiffs’ claim that Warner/Chappell does not own a
copyright stands or falls on Plaintiffs’ invalidity contentions alone.

1 legal requirements for copyright protection. The work nevertheless is “within the
2 subject matter of copyright” under § 301(a).

3 *Second*, Plaintiffs assert that the lyrics to *Happy Birthday to You* are not
4 “within the subject matter of copyright as specified by section[] ... 103.” 17 U.S.C.
5 § 301(a); *see* Opp. at 8-9 (citing 17 U.S.C. § 103(b)) (“The copyright in a
6 compilation or derivative work extends only to the material contributed by the
7 author of such work, as distinguished from the preexisting material employed in the
8 work, and does not imply any exclusive right in the preexisting material.”).
9 Plaintiffs say in *their Opposition* that the SAC alleges that Warner/Chappell’s
10 predecessor never sought copyright protection for the lyrics, and so the lyrics were
11 not “material contributed by the author.” *Id.* at 8 (citing SAC ¶¶ 75-95). In reality,
12 the SAC specifically alleges that for two of the copyright registrations—E51988 and
13 E51990—“the lyrics ... *were included* on the work registered with the Copyright
14 Office.” SAC ¶¶ 93, 98 (emphasis added). The SAC also alleges that the
15 applications for these registrations “claimed the copyrighted new matter as
16 ‘arrangement for Unison Chorus and revised text’” and “as ‘arrangement as easy
17 piano solo, with text,’” respectively. SAC ¶¶ 91-92, 96-97. Plaintiffs’ reliance on
18 § 103 to take their claims outside the subject matter of copyright is meritless.

19 **B. The Scope Prong of § 301(a) Is Satisfied Because Plaintiffs’ State-
20 Law Claims Are Not Qualitatively Different from Their Copyright
21 Claims**

22 Plaintiffs argue that their state-law claims survive the second prong of
23 § 301(a) because, as a formal matter, Plaintiffs contend that each has an “extra
24 element.” But Plaintiffs ignore the rule that the “extra element” must “*change[] the*
25 *nature of the action*” to avoid preemption. *Del Madera Props. v. Rhodes &*
26 *Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987) (emphasis added), *overruled on*
27 *other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The Court looks to
28 the *substance* of the claim, and not its label or whether in the abstract it may involve

1 an extra element, to decide whether that element changes the nature of the action.
2 *TeraRecon, Inc. v. Fovia, Inc.*, No. C 05-4407 CW, 2006 WL 1867734, at *3 (N.D.
3 Cal. July 6, 2006); *Idema*, 162 F. Supp. 2d at 1190. Because the substance of each
4 of Plaintiffs' state-law claims is that Warner/Chappell does not hold a valid
5 copyright to, and therefore cannot license, *Happy Birthday to You*, the state-law
6 claims are not "qualitatively different" from Plaintiffs' declaratory copyright claims.

7 Plaintiffs' arguments that their state-law claims are "separate and distinct"
8 from claims based on the exclusive rights provided for by 17 U.S.C. § 106 fail.
9 Opp. at 9-14. *First*, Plaintiffs assert that their state-law claims are not preempted
10 because the Copyright Act does not "protect[] a party's right to be free from the
11 unlawful assertion of copyright." Opp. at 9-10. This argument fails because the
12 Copyright Act establishes the rights and protections on which Plaintiffs' state-law
13 claims are based: the rights Plaintiffs allege Warner/Chappell has wrongfully
14 asserted and the rights Plaintiffs allegedly have to reproduce, distribute and publicly
15 perform *Happy Birthday to You* without infringing Warner/Chappell's copyright.
16 *See MRC II Distrib. Co. v. Coelho*, No. 2:12-CV-03539-ODW, 2012 WL 3810257,
17 at *1 (C.D. Cal. Sept. 4, 2012) (finding Copyright Act jurisdiction over claim that
18 defendants licensed materials allegedly in the public domain and over which
19 defendants allegedly falsely asserted ownership); *Twin Books Corp. v. Walt Disney*
20 *Co.*, 83 F.3d 1162, 1164-65 (9th Cir. 1996) (adjudicating defense to infringement
21 claim based on assertion that works at issue were in the public domain under the
22 1909 Copyright Act).

23 The error of Plaintiffs' argument is further illustrated by reference to the
24 Patent Act. The Patent Act, like the Copyright Act, provides an affirmative claim
25 for infringement but not an affirmative claim for non-infringement. *See* 35 U.S.C.
26 § 281. Federal courts, however, routinely adjudicate actions seeking declaratory
27 judgments of patent invalidity or non-infringement "on the theory that an
28 infringement suit by the declaratory judgment defendant would raise a federal

1 question [of patent law] over which the federal courts have exclusive jurisdiction.”
2 *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S.*
3 *California*, 463 U.S. 1, 19 n.19 (1983). The situation here is no different. Plaintiffs
4 claim that Warner/Chappell’s copyright is invalid as a matter of federal law, and
5 Plaintiffs seek a declaratory judgment under the Copyright Act vindicating their
6 position and ordering the refund of moneys paid to Warner/Chappell in licensing
7 fees. The action arises under federal copyright law notwithstanding that, as
8 declaratory judgment plaintiffs, Plaintiffs are on the other side of the “v.” from
9 where they would be in an infringement suit.

10 *Second*, Plaintiffs argue that their UCL and FAL claims survive preemption
11 because courts generally apply a presumption against preemption, and dismissal
12 “would frustrate the guiding precept of preemption.” Opp. at 10. But courts
13 routinely find UCL and FAL claims preempted by the Copyright Act without even
14 mentioning this mere presumption. *E.g., Kodadek v. MTV Networks, Inc.*, 152 F.3d
15 1209, 1211-13 (9th Cir. 1998); *Fovia*, 2006 WL 1867734, at *3-4; *Perfect 10, Inc. v.*
16 *Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1124-25 (C.D. Cal. 2001); *Xerox*
17 *Corp. v. Apple Computer, Inc.*, 734 F. Supp. 1542, 1550 (N.D. Cal. 1990); *Motown*
18 *Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1238-40 (C.D. Cal.
19 1987). Plaintiffs cite no case applying this presumption where rights under the
20 Copyright Act are at issue, and the presumption “is not triggered when the State
21 regulates in an area”—like copyright law—“where there has been a history of
22 significant federal presence.” *United States v. Locke*, 529 U.S. 89, 108 (2000).

23 *Third*, Plaintiffs claim that their UCL and FAL claims are not equivalent to
24 copyright claims because such claims can involve additional elements of fraud or
25 deceit. Opp. at 10-11. But just three pages later in their brief, Plaintiffs argue that
26 they do not have to satisfy the requirements of Rule 9(b) because Plaintiffs have *not*
27 based those claims on fraud or deceit. *See* Opp. at 14-17 (arguing that UCL claim is
28 not based on fraud, but Warner/Chappell’s assertion of “rights – namely copyrights

1 – that they do not possess,” and that Warner/Chappell’s “demand for money based
2 upon a copyright they do not own, whether technically ‘unlawful’ or not, is unfair
3 on its face”). As discussed below, Rule 9(b) applies where claims sound in fraud,
4 even if they are not strictly speaking fraud claims. But the point here is that, taking
5 Plaintiffs at their word, they do not allege fraud or deceit. The sole
6 “misrepresentation” that Plaintiffs allege is that Warner/Chappell states that it owns
7 the copyright to *Happy Birthday to You*—an absolutely true fact—whereas Plaintiffs
8 claim that the copyright is invalid. *See* Opp. at 16-17 (allegation that
9 Warner/Chappell’s website states that Warner/Chappell owns the copyright to the
10 song and seeking judicial notice of SEC filings stating that the song is in
11 Warner/Chappell’s parent company’s publishing portfolio). The gravamen of
12 Plaintiffs’ UCL and FAL claims therefore is the same as the federal claims.
13 *Compare* Opp. at 3 (Plaintiffs’ seek a declaration “that the Copyright Act does not
14 give Defendants the rights they have asserted and enforced”), *with* Opp. at 16
15 (Plaintiffs’ UCL claim is based on “alleg[ation] that Defendants have asserted rights
16 – namely copyrights – that they do not possess”). These state-law claims are thus
17 preempted. *Fovia*, 2006 WL 1867734, at *3-4; *Idema*, 162 F. Supp. 2d at 1190;
18 *Xerox*, 734 F. Supp. at 1550; *Motown*, 657 F. Supp. at 1239-40.³

19 _____
20 ³ Plaintiffs’ description of Warner/Chappell’s precedent is erroneous and their
21 attempt to distinguish these cases is unpersuasive. Opp. at 11-12. *Idema* involved
22 allegations of deceptive and misleading conduct and addressed Ninth Circuit law
23 regarding the preemption of unfair competition claims. 162 F. Supp. 2d at 1192-94.
24 *Idema* and other cited Ninth Circuit and California federal cases are apposite
because they found that alleged misrepresentations arguably providing an “extra
element” were insufficient to render UCL and/or FAL claims qualitatively different
from claims based on copyright rights. Mot. at 7, 10-11. The same is true here.

Plaintiffs’ cited authority is inapposite. *See Valente-Kritzer Video v. Pinckney*,
25 881 F.2d 772, 776 (9th Cir. 1989) (common law *fraud* claim founded on an
26 allegation that defendant “misrepresented its intent to perform [a] contract” not
preempted); *Bekaert Progressive Composites Corp. v. Wave Cyber Ltd.*, No.
27 06CV2440-LAB (LSP), 2007 WL 1110736, at *2-3 (S.D. Cal. Apr. 5, 2007) (UCL
claim based on “misrepresentation of goodwill, deliberate imitation to divert
28 business resulting in unjust enrichment, and false advertising” not preempted);
Educ. Testing Serv. v. Simon, 95 F. Supp. 2d 1081, 1091 (C.D. Cal. 1999) (UCL
(footnote continued on following page)

1 *Finally*, Plaintiffs argue that their contract and related claims (money-had-
2 and-received and rescission) survive preemption because “the Copyright Act does
3 not preempt the enforcement of contractual rights.” Opp. at 12. Contrary to
4 Plaintiffs’ contention, contract claims are not categorically immune from Copyright
5 Act preemption. As explained in *Kabehie v. Zoland*, 102 Cal. App. 4th 513
6 (2002)—in the sentence immediately preceding the excerpt that Plaintiffs block
7 quote—“[t]he mere breach of the promise inherent in every contract *does not*
8 *constitute the requisite extra element unless the promise creates a right qualitatively*
9 *different from copyright.*” *Id.* at 528 (emphasis added). On contract claims, as with
10 other state-law claims, it is the claims’ *substance* as actually pleaded—not the label
11 or formal elements of the claims—that determines whether the scope prong of
12 § 301(a) is satisfied.

13 Here, the “extra element” that Plaintiffs cite on the contract (and related
14 claims) does not “create[] a right qualitatively different from copyright.” *Id.*
15 Plaintiffs argue that their claims are different because they allege that the
16 “consideration” that Warner/Chappell provided under its licenses with Plaintiffs—
17 the right to use Happy Birthday to You—was “worthless.” Opp. at 13 (quoting
18 SAC ¶ 180). But that is nothing more than a restatement of Plaintiffs’ allegation
19 that Warner/Chappell did not actually have the rights under § 106 that
20 Warner/Chappell’s copyright certificates say it has. The contract and related claims
21 are nothing more than restatements of Plaintiffs’ claims seeking a declaration of
22 invalidity and declaratory and injunctive relief to put Plaintiffs in the same position
23 they would have been in had they never licensed the rights to the work. As in the
24 cases cited in Warner/Chappell’s Motion, these claims are therefore not *qualitatively*
25 *different* from Plaintiffs’ copyright claims. Mot. at 7, 11-12. Plaintiffs attempt to

26 _____
27 claim based on “bestowing or attempting to bestow an unfair advantage on their
28 clients in taking the MSAT” and violation of statute prohibiting “any conduct which
subverts or attempts to subvert an [sic] licensing examination” not preempted).

1 distinguish Warner/Chappell's authority on the ground that the plaintiffs in
2 Warner/Chappell's cases "were copyright owners who possessed rights under the
3 Copyright Act." Opp. at 13. This is nothing more than a restatement of Plaintiffs'
4 meritless argument that, because they are declaratory judgment plaintiffs alleging
5 copyright invalidity, § 301(a) and cases decided thereunder should not apply. The
6 argument does not become sound just because Plaintiffs repeat it over and over in
7 their Opposition. Plaintiffs' contract and related claims (like the UCL and FAL
8 claims) are preempted.

9 **III. THE MAXIMUM LIMITATIONS PERIOD IS THREE YEARS, AND**
10 **THE CLAIMS OF PLAINTIFFS MAJAR AND SIEGEL ARE BARRED**
11 **ENTIRELY**

12 **A. The Copyright Act's Three-Year Limitations Period Applies to**
13 **Plaintiffs' Declaratory Copyright Claims**

14 A declaratory judgment claim that seeks to determine copyright ownership is
15 subject to the Copyright Act's three-year statute of limitations. 17 U.S.C. § 507(b);
16 *Welles v. Turner Entm't Co.*, 503 F.3d 728, 734 (9th Cir. 2007) (applying three-year
17 limitations period to declaratory claim seeking to determine copyright ownership).
18 Because Plaintiffs' declaratory judgment claims plainly seek to determine whether
19 Warner/Chappell owns a valid copyright in *Happy Birthday to You* under federal
20 copyright law, § 507(b) governs these claims. See SAC ¶ 1 (alleging jurisdiction
21 under 28 U.S.C. § 1338, which provides exclusive federal jurisdiction for copyright
22 actions, and alleging that the declaratory claims "aris[e] under the Copyright Act"),
23 *id.* ¶ 4 ("This is an action to declare invalid the copyright that Defendants claim to
24 own"); *id.* ¶ 148 ("Plaintiffs seek adjudication of an actual controversy arising under
25 the Copyright Act"); Opp. at 3 (Plaintiffs' seek a declaration "that the Copyright Act
26 does not give Defendants the rights they have asserted and enforced").

27 Plaintiffs contend that § 507 (b) does not apply because they do not assert a
28 claim for infringement. Opp. at 19-20. But § 507 (b) is broader than that: it applies

1 to any civil action “maintained under the provisions of this title,” not just an action
2 for infringement. Plaintiffs’ declaratory judgment claims are plainly a civil action
3 under Title 17. Section 507 (b) does not state that it is applicable only to
4 infringement claims, and courts have not read such a limitation into the statute. *See*
5 *Welles*, 503 F.3d at 734; *Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1111 n.147
6 (C.D. Cal. 2005) (“The three year statute of limitations governing copyright
7 infringement actions also governs claims for declaratory relief regarding copyright
8 ownership or infringement.”); *Aday v. Sony Music Entm’t, Inc.*, No. 96 CIV. 0991
9 (MGC), 1997 WL 598410, at *5 (S.D.N.Y. Sept. 25, 1997) (Second Circuit “has not
10 limited the application of the three-year statute of limitations to infringement claims
11 and has applied it to claims seeking declarations of copyright ownership”); *see also*
12 *Coelho*, 2012 WL 3810257, at *1 (declaratory judgment claim seeking to invalidate
13 copyright arises under Copyright Act).⁴

14 Plaintiffs’ suggestion that the Court “borrow” the limitations period for UCL
15 claims from state law is meritless. *Opp.* at 20-21. Courts will borrow a state statute
16 of limitations where a federal claim does not have its own limitations period.
17 “Where ... Congress explicitly provides a limitations period in the text of the
18 statute, that period is definitive. There is no need to borrow a state period.” *Burgh*
19 *v. Borough Council of Borough of Montrose*, 251 F.3d 465, 472 (3d Cir. 2001)
20 (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946)). Because Plaintiffs’
21 declaratory judgment claims are based on the Copyright Act, which has an express
22 three-year statute of limitations, § 507(b), that limitations period applies. *Welles*,
23 503 F.3d at 734. Plaintiffs’ policy arguments are unavailing and foreclosed by
24 precedent.

25 _____
26 ⁴ Plaintiffs’ misreading of § 507(b) stems from their erroneous conception that the
27 Copyright Act does not govern affirmative claims of non-infringement. Again, just
28 as the Patent Act extends to actions seeking declaratory judgments of patent
invalidity or non-infringement, *Franchise Tax Bd.*, 463 U.S. at 19 n.19, so too does
the Copyright Act extend to actions seeking declaratory judgments of copyright
invalidity, *Coelho*, 2012 WL 3810257, at *1.

1 **B. Plaintiffs Have Not Alleged a Basis for Tolling the Governing**
2 **Statutes of Limitations**

3 In their Opposition, Plaintiffs for the first time contend that their declaratory
4 judgment, FAL and money-had-and-received claims are subject to equitable tolling.⁵
5 Plaintiffs argue that the delayed discovery rule applies, and they appear also to
6 suggest that fraudulent concealment tolls the limitations periods. Opp. at 22-24.
7 Both arguments fail.

8 “In order to invoke [the delayed discovery exception] to the statute of
9 limitations, the plaintiff must specifically plead facts which show (1) the time and
10 manner of discovery and (2) the inability to have made earlier discovery despite
11 reasonable diligence.” *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1130
12 (C.D. Cal. 2010) (citations and internal quotation marks omitted). “The burden is
13 on the plaintiff to show diligence, and conclusory allegations will not withstand
14 [dismissal].” *E-Fab, Inc. v. Accountants, Inc. Servs.*, 153 Cal. App. 4th 1308, 1319
15 (2007) (citations and internal quotation marks omitted). Plaintiffs cannot rely on the
16 delayed discovery rule. The SAC does not allege equitable tolling or delayed
17 discovery, and it does not contain a single allegation as to the time or manner in
18 which Plaintiffs discovered their declaratory judgment, FAL or money-had-and-
19 received claims. *Yumul*, 733 F. Supp. 2d at 1131 (discovery rule inapplicable as a
20 matter of law because plaintiff failed to “allege[] the time and manner of her
21 discovery of the facts giving rise to her claims”); *Keilholtz v. Lennox Hearth*
22 *Products Inc.*, No. C 08-00836 CW, 2009 WL 2905960, at *5 (N.D. Cal. Sept. 8,
23 2009) (discovery rule inapplicable as a matter of law because Plaintiffs did “not

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26 ⁵ As discussed below, the SAC provides no suggestion that equitable tolling applies.
27 Contrary to the Local Rules’ requirements for the pre-motion Conference of
28 Counsel, as well as this Court’s admonition about how to conduct that conference,
Plaintiffs did not mention this theory during the parties’ conference, or in response
to Warner/Chappell’s post-conference requests for any authority supporting
Plaintiffs’ assertion that a four-year statute applies. Klaus Decl. ¶¶ 3-5 & Ex. A.

1 adequately allege[] how and when the class members with time-barred claims
2 discovered the alleged fraud”).⁶

3 Contrary to Plaintiffs’ contention, the SAC is bereft of *any* allegations that
4 Plaintiffs could not have discovered the facts underlying their claims earlier through
5 the exercise of reasonable diligence. Plaintiffs cannot demonstrate the
6 reasonableness of their alleged lack of knowledge by citing *Happy Birthday to You’s*
7 purportedly “byzantine history” and the claimed difficulty of discovering that
8 Warner/Chappell allegedly owns no copyright in the song. Opp. at 24. This
9 contention simply is not plausible given that the SAC itself appears to be largely
10 replicated from a law review article published more than three years before
11 Plaintiffs filed their complaints in this action. See SAC ¶ 8 (“Professor Robert
12 Brauneis ... a leading legal scholar in intellectual property law, has stated that it is
13 ‘doubtful’ that Happy Birthday ‘is really still under copyright.’”); Robert Brauneis,
14 *Copyright and the World’s Most Popular Song*, 56 J. Copyright Soc’y U.S.A. 335,
15 338 (2009) (“[I]t is doubtful that ‘Happy Birthday to You,’ the famous offspring of
16 ‘Good Morning to All,’ is really still under copyright.”)⁷; see also Keilholtz, 2009
17 WL 2905960, at *4 (discovery rule inapplicable as a matter of law where “class
18 members with time-barred claims had ‘notice or information of circumstances to put
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20
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22 _____
23 ⁶ Tellingly, although Warner/Chappell’s Motion highlighted why the discovery rule
24 does not apply, Plaintiffs’ Opposition does not even suggest when Plaintiffs actually
learned about their claims. Mot. at 20.

25 ⁷ Compare SAC ¶¶ 16-110, with Brauneis, *supra*, at 348-49, 362-63, 365-409.
26 Brauneis’s 2009 article directed readers to an online appendix that purported to trace
27 the ownership and history of *Happy Birthday to You* and that included links to
28 various historical documents, such as the *Happy Birthday to You* registration
certificates. Brauneis, *supra*, at 397 & n.222, 380 n.170; see also Robert Brauneis,
“*Copyright and the World’s Most Popular Song*” Appendices, Documents and
Sound Recordings, <http://docs.law.gwu.edu/facweb/rbrauneis/happybirthday.htm>
(last visited Sept. 16, 2013).

1 a reasonable person on inquiry or the opportunity to obtain knowledge open to
2 investigation.”) (alterations and citation omitted).⁸

3 Because Plaintiffs do not allege how they discovered their claims or why they
4 were unable to do so earlier, they likewise cannot show that fraudulent concealment
5 tolls their claims. *Yumul*, 733 F. Supp. 2d at 1131 (“In order to establish fraudulent
6 concealment, the complaint must show: (1) when the fraud was discovered; (2) the
7 circumstances under which it was discovered; and (3) that the plaintiff was not at
8 fault for failing to discover it or had no actual or presumptive knowledge of facts
9 sufficient to put him on inquiry.”) (citation and internal quotation marks omitted).
10 Indeed, a claim that fraudulent concealment should toll a statute of limitations must
11 be pled with particularity under Rule 9(b). *Id.* at 1132-33. Plaintiffs cannot satisfy
12 9(b) where they have not offered a single allegation as to how or when they
13 discovered their claims. And as discussed above and in Warner/Chappell’s Motion,
14 Plaintiffs have not alleged an actionable misrepresentation or reasonable reliance
15 under Rule 8(a), let alone under Rule 9(b).⁹

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20 ⁸ The Brauneis article, in fact, was available in March 2008, more than *five* years
21 before Plaintiffs filed this lawsuit. See Social Science Research Network, *Copyright*
22 *and the World’s Most Popular Song*,
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1111624& (stating article was
originally posted Mar. 21, 2008) (last visited Sept. 16, 2013).

23 ⁹ None of Plaintiffs’ cases supports the application of equitable tolling here. See
24 *Welles*, 503 F.3d at 734 (“A claim for copyright ownership is barred three years
25 from the ‘plain and express repudiation’ of copyright ownership.”) (citations
26 omitted); *Henderson v. J.M. Smucker Co.*, No. CV 10-4524-GHK (VBKx), 2011
27 WL 1050637, at *2 (C.D. Cal. Mar. 17, 2011) (question of fact regarding delayed
28 discovery where there were specific allegations about the time and manner of
plaintiff’s discovery and about plaintiff’s reasonable diligence); *Weatherly v.*
Universal Music Publ’g Grp., 125 Cal. App. 4th 913, 918-20 (2004) (question of
fact regarding delayed discovery where there was evidence that defendant
“hindered” plaintiff from discovering the breach and defendant refused to provide
plaintiff with material information it had requested).

1 **C. Preempted and Time-Barred Claims and Plaintiffs Should Be**
2 **Dismissed, or Stricken, with Prejudice**

3 For the reasons discussed above and in Warner/Chappell's Motion, each of
4 Plaintiffs' state-law claims is preempted (and some are also insufficiently pled).
5 Moreover, Plaintiffs' declaratory judgment, FAL and money-had-and-received
6 claims—to the extent they survive preemption (and dismissal under Rule 9(b))—are
7 subject to a three-year statute of limitations and should be dismissed to the extent
8 they fall outside this period. *Yumul*, 733 F. Supp. 2d at 1133 (dismissing putative
9 class action complaint “to the extent it alleges conduct occurring outside the relevant
10 statutes of limitations”); *Keilholtz*, 2009 WL 2905960, at *5 (dismissing class
11 claims outside the applicable statutes of limitations). Finally, all of Major's and
12 Siegel's claims are preempted and/or time-barred, so these Plaintiffs should be
13 dismissed from the case. Dismissal of preempted and/or time-barred claims and
14 Plaintiffs should be with prejudice because amendment would be futile. *Johnson v.*
15 *Dist. 2 Marine Eng'rs Beneficial Ass'n*, 857 F.2d 514, 517-18 (9th Cir. 1988)
16 (affirming dismissal with prejudice of preempted state-law claims); *Hinton v.*
17 *Pacific Enters.*, 5 F.3d 391, 396-97 (9th Cir. 1993) (affirming dismissal with
18 prejudice of time-barred claims).

19 Alternatively, if the Court determines that a motion to strike is the appropriate
20 mechanism for limiting the SAC's class period allegations, then Plaintiffs' proposed
21 class definition should be stricken with prejudice under Rule 12(f) to the extent it
22 includes declaratory judgment, FAL and/or money-had-and-received claims outside
23 a three-year period. *Shabaz v. Polo Ralph Lauren Corp.*, 586 F. Supp. 2d 1205,
24 1211 (C.D. Cal. 2008); *Campbell v. PricewaterhouseCoopers*, No. CIV. S-06-2376
25 LKK/GGH, 2008 WL 3836972, at *6 (E.D. Cal. Aug. 14, 2008). Plaintiffs'
26 argument that their class allegations should not be limited or stricken is
27 unpersuasive. Opp. at 24-25. Although Plaintiffs cite *Henderson v. J.M. Smucker*
28 *Co.*, No. CV 10-4524-GHK (VBKx), 2011 WL 1050637 (C.D. Cal. Mar. 17, 2011),

1 for the proposition that “[t]he permissible scope of the class, if any, is a question
2 best addressed through a motion for class certification,” that holding was based on
3 “questions of fact which bear on the nature of Defendant’s duty to nonresident
4 plaintiffs,” which was relevant to standing and could not be determined from the
5 pleadings. *Id.* at *2. That Plaintiffs have impermissibly attempted to extend the
6 applicable statutes of limitations is apparent from the pleadings, as is the fact that
7 equitable tolling does not apply. Similarly, *Shabaz* and *Campbell* do not help
8 Plaintiffs, as those cases in fact granted motions to strike time-barred class
9 allegations (even though they dismissed motions to strike on other grounds).
10 *Shabaz*, 586 F. Supp. 2d at 1205, 1211 (striking class allegations outside the
11 limitations period); *Campbell*, 2008 WL 3836972, at *5-10 (same).

12 **IV. ASIDE FROM BEING PREEMPTED, SEVERAL OF PLAINTIFFS’**
13 **STATE-LAW CLAIMS ARE ALSO INSUFFICIENTLY PLEADED**

14 **A. Plaintiffs’ UCL and FAL Claims Are Grounded Fraud but Do Not**
15 **Satisfy Rule 9(b), or Even State Plausible Claims**

16 Under Rule 9(b), a plaintiff must “state with particularity the circumstances
17 constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b) applies to UCL and
18 FAL claims that sound in fraud even though fraud is not a necessary element of
19 these claims. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009);
20 *United Food & Commercial Workers Cent. Pa. & Reg’l Health & Welfare Fund v.*
21 *Amgen, Inc.*, 400 F. App’x 255, 257 (9th Cir. 2010). To avoid the application of
22 Rule 9(b), Plaintiffs walk away from their allegations of fraud and deception and
23 attempt to expand upon their theories of UCL-based liability. *Opp.* at 14-16.¹⁰ But

24 ¹⁰ Plaintiffs do cling to their allegations of fraud and misrepresentation when
25 expedient. As noted above, they do so to suggest their UCL and FAL claims are not
26 preempted and in arguing that the governing limitations periods should be equitably
27 tolled. *Opp.* at 10-11, 22-23 & n.14. This tactic is unconvincing, as Plaintiffs
28 concede that their allegations based on fraudulent conduct are deficient. *Id.* at 17.
Separately, Plaintiffs attempt to expand the scope of their UCL claim by contending,
for the first time, that it may be based on their money-had-and-received and
rescission claims. *Id.* at 16.

1 the SAC nonetheless bases the UCL and FAL claims on alleged “deceptive and
2 misleading conduct,” “nondisclosures,” and like conduct, and these claims are
3 therefore grounded in fraud. *See Kearns*, 567 F.3d at 1125 (UCL claims that “allege
4 a unified course of fraudulent conduct”—including those based on nondisclosures—
5 subject to Rule 9(b)); *Yumul*, 733 F. Supp. 2d at 1122-23. In *Meinhold v. Sprint*
6 *Spectrum, L.P.*, No. CIV. S-07-00456 FCD EFB, 2007 WL 1456141 (E.D. Cal. May
7 16, 2007), for example, the court held that “all of plaintiff’s claims are ‘grounded in
8 fraud’ such that she must meet 9(b)’s heightened pleading standard” where the UCL
9 claim was based on “unlawful, unfair, and *fraudulent* business practices” and the
10 FAL claim alleged “that defendant made representations that it knew or should have
11 known were untrue or misleading.” *Id.* at *6. As in *Meinhold*, Plaintiffs’ UCL and
12 FAL claims are grounded in fraud and subject to Rule 9(b). *See* SAC ¶¶ 175-80,
13 200.

14 Plaintiffs fail to show that their UCL or FAL claims are sufficiently pled
15 under Rule 9(b) or even Rule 8(a). *First*, Plaintiffs cannot satisfy Rule 9(b) by
16 relying on their lone allegation regarding Warner/Chappell’s website and their
17 generic and nonspecific allegations regarding Warner/Chappell’s demands to two of
18 the four Plaintiffs. *Yumul*, 733 F. Supp. 2d at 1122-23. More significantly,
19 Plaintiffs cannot plead an actionable misrepresentation based on Warner/Chappell’s
20 alleged statements—in its website, to Plaintiffs, and/or in SEC filings—that it owns
21 federal copyrights in *Happy Birthday to You*. As Plaintiffs acknowledge in their
22 complaint and Opposition, Warner/Chappell *does* own federal copyrights in the
23 song. SAC ¶¶ 93, 96, 107, 110; Opp. at 5-6. Although Plaintiffs contend that those
24 copyrights are invalid, based on their erroneous view of originality and other aspects
25 of copyright law, that does not make Warner/Chappell’s mere assertion of copyright
26 ownership a “misrepresentation.”

27 *Second*, Plaintiffs fail to respond to Warner/Chappell’s argument that the
28 UCL and FAL claims do not allege reasonable reliance sufficiently under Rule 8(a).

1 Plaintiffs have conceded this issue. *Deirmenjian v. Deutsche Bank, A.G.*, No. CV
2 06-00774 MMM (CWx), 2010 WL 3034060, at *7 & n.110 (C.D. Cal. July 30,
3 2010) (party abandons claims and issues that it does not address in opposing
4 dismissal or summary judgment); *Hopkins v. Women’s Div., General Bd. of Global*
5 *Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) (“[W]hen a plaintiff files an
6 opposition to a dispositive motion and addresses only certain arguments raised by
7 the defendant, a court may treat those arguments that the plaintiff failed to address
8 as conceded.”); *Anti-Monopoly, Inc., v. Hasbro, Inc.*, 958 F. Supp. 895, 907 & n. 11
9 (S.D.N.Y.1997) (“[T]he failure to provide argument on a point at issue constitutes
10 abandonment of the issue.”).

11 **B. Plaintiffs’ Rescission Claim Asserts a Remedy**

12 “Rescission is *not* a cause of action; it is a remedy.” *Nakash v. Superior*
13 *Court*, 196 Cal. App. 3d 59, 70 (1987); *see also Taguinod v. World Sav. Bank, FSB*,
14 755 F. Supp. 2d 1064, 1072 (C.D. Cal. 2010) (dismissing rescission claim because it
15 is a remedy, not a cause of action). Accordingly, dozens of California federal courts
16 have dismissed claims for rescission under California law.¹¹ Although Plaintiffs
17 have located cases adjudicating “claims” of rescission, the parties in those cases do
18 not appear to have argued for dismissal because rescission is actually a remedy. In
19 any event, dismissal of Plaintiffs’ rescission claims is plainly appropriate under the
20 cases cited by Warner/Chappell.¹²

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22 ¹¹ *See, e.g., Varela v. Wells Fargo Home Mortgage*, No. C-12-3502 KAW, 2012 WL
23 6680261, at *11 (N.D. Cal. Dec. 21, 2012) (“It is true that rescission is a remedy and
24 not a cause of action.”) (citing *Mangindin v. Washington Mut. Bank*, 637 F. Supp.
25 2d 700, 709 (N.D. Cal. 2009); *Kauai Scuba Ctr., Inc. v. PADI Americas, Inc.*, No.
26 SACV 10-1579 DOC (MANx), 2011 WL 2711177, at *4 (C.D. Cal. July 13, 2011)
27 (“[R]escission is a remedy, not a cause of action.”) (citing Cal. Civ. Code §§ 1689,
28 169; *Ozuna v. Home Capital Funding*, No. 08-CV-2367-IEG (AJB), 2009 WL
4544131, at * 11 (S.D. Cal. Dec.1, 2009); and *Nakash*, 196 Cal. App. 3d at 70).

¹² Plaintiffs’ reliance on Cal. Civ. Code § 1692 is misplaced because that statute
does not “allow rescission as a cross-complaint.” Opp. at 19. Instead, it allows a
party to a contract *that has already been rescinded* to “assert[] such rescission by
way of defense or cross-complaint.” Cal. Civ. Code § 1692. Plaintiffs’ reliance on
(footnote continued on following page)

1 **V. CONCLUSION**

2 Warner/Chappell respectfully submits that Plaintiffs' UCL, breach of
3 contract, money-had-and-received, rescission and FAL claims should each be
4 dismissed with prejudice; that time-barred putative class claims should be
5 dismissed, or stricken, with prejudice; and that Plaintiffs Majar and Siegel should be
6 dismissed with prejudice.

7
8 DATED: September 16, 2013 MUNGER, TOLLES & OLSON LLP

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10
11 By: /s/ Kelly M. Klaus
12 KELLY M. KLAUS
13 Attorneys for Defendants Warner/Chappell
14 Music, Inc. and Summy-Birchard, Inc.

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28 Cal. Civ. Code § 1693 is also misplaced because this statute does not indicate that
rescission is a claim, as opposed to a remedy.