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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SCORPIO MUSIC (BLACK SCORPIO) S.A. and
CAN'T STOP PRODUCTIONS, INC.

Plaintiffs,

vs.

VICTOR WILLIS

Defendant.

Case No. 3:11-CV-01557-BTM (RBB)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF DEFENDANT'S MOTION TO
DISMISS THE COMPLAINT**

Date: November 18, 2011

Time: 11:00 a.m.

Courtroom: 15 – Fifth Floor

Judge: Hon. Barry T. Moskowitz

**NO ORAL ARGUMENT UNLESS
REQUESTED BY COURT**

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1 **PRELIMINARY STATEMENT**

2 Defendant Victor Willis is the original lead singer of the iconic musical group Village
3 People, which recorded several hit albums in the 1970's and 1980's. Willis, in addition to recording
4 the lead vocals, also authored the lyrics to many of the musical compositions that were recorded by
5 the Village People, including the classic songs, *Y.M.C.A.*, *In the Navy*, and *Go West*. Through a
6 series of agreements entered into from 1977-1979, Willis granted his copyright interests in those
7 musical compositions to Can't Stop Music ("CSM"), a division of Plaintiff Can't Stop Productions,
8 Inc. ("CSP"). Co-Plaintiff Scorpio Music, S.A. ("Scorpio") also claims current ownership interests
9 to the rights granted by Willis to CSM.

10 Many of these songs were created shortly after January 1, 1978, when certain revisions to the
11 U.S. Copyright Act took effect. Of particular import to this action, those revisions included the right
12 of authors to "terminate" post-1977 grants of copyright after 35 years, and thereby to recapture the
13 ownership interests conveyed in the copyrighted works for their remaining terms of copyright. 17
14 U.S.C. §203. Congress created this statutory termination right to protect authors who may have
15 entered into unfavorable agreements, at a time when they had little bargaining leverage, by providing
16 the author with an opportunity to enter into a new agreement once the true value of the copyrighted
17 work has been established.

18 In January 2011, Willis, pursuant to and in accordance with such statutory provisions, duly
19 served on Plaintiffs a "Notice of Termination of Post 1977 Grants of Copyrights on Certain Works
20 of Victor Willis" (the "Notice") with respect to his interests in 33 musical compositions (the
21 "Compositions") that were the subject of his post-1977 grants of copyright to CSM (the "Grants").
22 With respect to each of the Grants identified in the Notice, Willis was the sole grantor, and through
23 those Grants he conveyed his copyright interests in the Compositions to CSM.

24 Plaintiffs have disputed the validity of the Notice, and have now commenced this action,
25 seeking a declaration of this Court that Willis', "attempt to exercise rights of recapture pursuant to
26 Section 203(a) of the United States Copyright Act (17 U.S.C. Section 203(a)) is void and of no force
27 or effect". Plaintiffs' Complaint claims that the Notice is invalid for the following three reasons:

1 First, Plaintiffs contend that because the Compositions are “joint works,” as defined under applicable
2 copyright law, Section 203(a)(1) of the Copyright Act requires a majority of the authors of the joint
3 work to terminate. Second, Plaintiffs’ claim – for the first time since the creation of the
4 Compositions – that Willis was a “writer for hire” under applicable copyright law and thus had no
5 copyright interests in the Compositions that could be the subject of a termination notice. Third,
6 Plaintiffs’ resort to the absurd claim that Willis should now be barred from contesting the “validity
7 of his status as a writer for hire” on equitable grounds of statute of limitations, laches and estoppel,
8 simply because he has received significant income under the Grants for the last 30 years.

9 In addition, and perhaps realizing the lack of merit of those challenges to the validity of the
10 Notice, Plaintiffs also seek, alternatively, two declarations from this Court in the event the Notice is
11 found to be valid. First, Plaintiffs assert, without any legal or factual basis, that Willis’ recapture
12 rights should be limited to the royalty percentage interests contained in the Grants, *i.e.* the 12%-20%
13 income streams Willis currently receives under the terms of the Grants. Second, Plaintiffs seek a
14 wholly unnecessary declaration that the Notice of Termination should not be deemed to terminate
15 existing licenses to use the Compositions.

16 Each of the arguments concerning the validity of the Notice is either incorrect as a matter of
17 law or belied by the very documents referred to and relied upon by Plaintiffs in the Complaint.
18 Plaintiffs’ two alternative arguments similarly fail to state claims for relief as a matter of law.

19 First, as a matter of law, Section 203(a)(1) does not require a majority of the authors of a
20 joint work to execute a Notice of termination of a particular grant of copyright. The express, clear,
21 and unambiguous language of Section 203(a)(1) states that “ In the case of a **grant** executed by one
22 author, termination of the grant may be effected by that author....” Here, the Grants were solely
23 executed by Willis, and thus Mr. Willis can serve Notice of termination of those Grants that he alone
24 made.

25 Next, the documents referred to and relied upon by Plaintiffs in the Complaint refute
26 definitively any claim that Willis was an “employee” or a “writer for hire”, or that his contributions
27 to the creation of the Compositions were “works made for hire”. Specifically, the Grants themselves

1 contain no express provisions therein that use the phrase or term “writer for hire” or “employee” or
2 “work made for hire”, nor are there any provisions in the Grants upon which a “writer for hire” or
3 “employee” status or “works for hire” designation could be reasonably implied or inferred. To the
4 contrary, the agreements expressly contain language of transfer and conveyance, which is wholly
5 consistent with a grant of copyrights by the author – Willis – to CSM, and completely at odds with
6 any claim that the Compositions were works made for hire. Similarly, the Complaint relies upon the
7 contemporaneous registrations of these works in the United States Copyright Office filed by and on
8 behalf of Scorpio. Each of these 33 separate registrations that were filed at various times over an
9 approximately thirty month period specifically identify Willis – not CSM – as one of the “authors”
10 of the Compositions, and make no claim that they were work made for hire. The implausible,
11 conclusory, sparse allegations of the Complaint concerning Willis’ supposed “employment
12 relationship” with CSP do not overcome in any way these dispositive documents, and otherwise
13 wholly fail to allege any of the essential factual indicia of an employee relationship as set forth in the
14 seminal Supreme Court work-for-hire decision, *Community for Creative Non-Violence v. Reid*, 490
15 U.S. 730 (1989).

16 Third, Plaintiffs’ time-related defense that the statute of limitations, estoppel and laches bar
17 Willis from contesting “the validity of his status as a writer for hire,” are wholly misplaced and have
18 no bearing here. The simple fact is that Willis’ Notice does not seek to contest any “work-for-hire”
19 status, as it was not until after Willis served and filed his Termination Notice in January 2011 that
20 Plaintiffs ever even raised this argument. Accordingly, for limitations purposes, the work for hire
21 dispute cannot be deemed to have accrued any earlier than January of this year. Moreover, pursuant
22 to the Copyright Act statute, Willis’ claims to copyright ownership through the Notice did not vest,
23 and thus did not accrue, until the Notice was served, less than one year ago. Finally, Plaintiffs’
24 “equitable” argument that Willis’ statutory claims under the Copyright Act should be barred because
25 he has received “hundreds of thousands of dollars” over the last 30 years under the Grants is absurd
26 on its face. This contention has no basis in fact or law, and instead evidences the Plaintiffs’
27 desperation to make any argument no matter how implausible to cut off Willis’ statutory right to

1 serve a Notice of Termination of the Grants, and the effect thereof. In any event, the Complaint is
2 completely devoid of any allegations of that would support either a statute of limitations, laches or
3 estoppel bar to Willis contesting Plaintiffs' newly minted claim of work-for-hire.

4 Finally, neither of Plaintiffs' alternative contentions concerning the effect of the Notice have
5 any legal validity. First, with respect to the copyright interest that Willis will recapture in the
6 Compositions, the Copyright Act is clear and unambiguous as to the effect of termination, providing
7 that, "all rights under this title that were covered by the terminated grants revert to the author..."
8 Plaintiffs' claim, that those interests should be limited by the *royalty percentages* agreed to by Willis
9 at the time of execution of the Grants, has no basis in law and is directly contrary to the very purpose
10 of the Act to protect authors from unfair bargains entered into when they had no leverage. Second,
11 with respect to the sought Declaration as to Plaintiffs' right to continue to exploit existing uses of the
12 Compositions, there is simply no justiciable controversy ripe for adjudication. Willis has never
13 disputed this point, which merely asserts Plaintiffs' rights under the so-called "derivative works
14 exception" to the termination provisions of the Copyright Act. *See* 17 U.S.C. §203(b)(1).

15 Accordingly, Willis now moves to dismiss the Complaint pursuant to Federal Rule of Civil
16 Procedure 12(b)(6) on the grounds that, as matter of law, it fails to state a claim upon which relief
17 can be granted to Plaintiffs.¹

18 **STATEMENT OF FACTUAL ALLEGATIONS OF THE COMPLAINT**

19 The following pertinent factual allegations set forth in the Complaint (annexed as Exhibit A
20 to the accompanying Declaration of Brian D. Caplan ("Caplan Decl.") are, solely to the extent they
21 are plausible, to be taken as true² for the purposes of this motion:

22 _____
23 ¹ While Defendant moves to dismiss the Complaint brought by Plaintiffs, which asserts
24 specific grounds attacking the Notice, Defendant reserves its rights as to all other issues that have
25 arisen between the parties, including Defendants' positions that Willis is the sole author of the lyrics
26 to the Compositions; that there were no translations or adaptations of "Foreign works" as no such
foreign works existed; and Henri Belolo did not make any copyrightable contributions to the
Compositions.

27 ² In certain instances, particularly in Complaint ¶16, Plaintiffs have misstated how Willis
described himself in the Notice and in the Schedule "A" attached thereto, and the recitation below of

- 1 A. Between 1977 and 1979, Willis entered into a series of agreements with CSP.³
2 Compl. ¶7;
- 3 B. Pursuant to these Agreements, CSP “acting on behalf of Scorpio, hired [Willis] to
4 translate the lyrics of and/or create new lyrics for certain musical compositions which
5 were owned and published in France” by Scorpio. Compl. ¶8;
- 6 C. CSP, “instructed Willis concerning what English lyrics it desired him to provide,
7 and supervised [Willis’] work in this regard by among other things, providing him
8 with, and paying for the facilities in which he rendered his services.” Compl. ¶9;
- 9 D. Willis, “in accordance with the terms of the Agreements, wrote and/or translated
10 some but not all of the English lyrics of these compositions.” Compl. ¶10;
- 11 E. CSP assigned to Scorpio its rights in these lyrics and “filed on behalf” of Scorpio
12 “copyright registrations in the... Copyright Office for the songs.” Compl. ¶11;
- 13 F. These registrations credited Willis “as being one of several writers on each of these
14 compositions.” Compl. ¶12;
- 15 G. Willis received for over 30 years “as compensation for his services and in accordance
16 with the terms of the Agreements, a percentage of [CSP’s] receipts from [their]
17 commercial exploitation, which percentages range from 12% to 20% depending upon
18 the composition.” Compl. ¶13;
- 19 H. In January 2011, Willis served upon CSP the Termination Notice, a copy of which is
20 attached as Exhibit “A” to the Complaint. Compl. ¶14;
- 21 I. The Termination Notice “purports to terminate the rights among others [Scorpio] and
22 its agent [CSP] in certain composition which are enumerated on Schedule A of the
23 Notice”. Compl. ¶15;

24
25 the Complaint allegations reflect these allegations, subject to footnotes that correct any such
misstatements of a cited document.

26 ³ All references to CSP include its division Can’t Stop Music who is the actual party to these
27 agreements with Willis.

- 1 J. The Termination Notice “incorrectly states that [Willis] is ‘the author of the work
2 and the sole grantor of the rights under the Agreements”⁴, and also that Willis
3 “wrongfully suggests that the entire copyright in all of the Compositions should be
4 assigned to him” upon the expiration of the 35 year period.⁵ Compl. ¶16;
- 5 K. CSP responded to the Termination Notice by advising Willis’ attorney that Willis
6 “had no legitimate right to seek termination” of Scorpio’s copyright ownership and
7 demanded that the Termination Notice be withdrawn. Compl. ¶17;
- 8 L. Willis through his attorney refused, Complaint ¶18, and that such refusal “is contrary
9 to the facts and the governing law.” Compl. ¶19;
- 10 M. “The Compositions in their English language versions are joint works written by
11 more than one person.” Compl. ¶20;
- 12 N. Each of the writers “ granted their copyright interests, if any, either to [CSP] as agent
13 for [Scorpio], or to [Scorpio] itself. Compl. ¶22;
- 14 O. Willis signed the Agreements with CSP, and the other writers signed agreements
15 with Scorpio. Compl. ¶23;
- 16 P. A portion of Section 203(a)(1) is quoted` as follows: “[i]n the case of a grant
17 executed by two or more authors of a joint work, termination of the grant may be
18 effected by a majority of the authors who executed it.” Compl. ¶24;
- 19 Q. Willis, “simply because he signed documents different from the ones signed by the
20 other authors of the same joint work, is neither the sole grantor nor only author of
21 any of the Compositions and hence he is not a ‘majority of authors’. As a result,
22 Willis “could not terminate the copyright assignment for any of the Compositions
23

24 ⁴ As indicated by the Notice and in Schedule “A” attached thereto, Willis is actually described
25 as “the sole grantor of the rights under the Agreements” and is described in the Schedule as
26 “Author(s) Executing Grant”. These documents do not claim that Willis is the sole author of the
works as suggested by this portion of Complaint ¶16.

27 ⁵ Neither the Notice nor the Schedule A in any way makes such suggestion, expressly or
28 impliedly, but merely follows the relevant statutory language and Copyright Office regulations.

without at least one other writer joining with him” so that “Willis’ attempt to do so is, therefore void as to all compositions.” Compl. ¶25;

R. Willis was “employed” by CSP and “hence he is a writer for hire with no right in the copyrights” for which he provided “some English lyrics.” Compl. ¶26;

S. In addition to the Agreements that established Willis’ writer for hire status, “the circumstances pursuant to which [he] rendered his services confirm that he functioned as an employee” of CSP. Compl. ¶27;

T. CSP, as part of its regular business representing Scorpio in the U.S “supervised and controlled the manner and means by which [Willis] worked including its location and duration, as well as the substance and meaning of the lyrics to be provided.” Compl. ¶28;

U. These Compositions, “with some of the English lyrics provided “ by Willis, “appeared as parts of record albums (*i.e.* collective works) further qualifying [Willis’] contribution to the Compositions as being works made for hire pursuant to” Section 101(2). Compl. ¶29;

V. Section 203(a) of the Copyright Act “specifically excludes works made for hire.” Compl. ¶30.

W. Willis entered into the Agreements more than 30 years ago. Compl. ¶31;

X. During this period CSP paid Willis “hundreds of thousands of dollars.” Compl. ¶32;

Y. “Equitable concepts such as laches and estoppel, as well as the relevant statute of limitations, preclude any attempt by [Willis] to contest the validity of his status as a writer for hire.” Compl. ¶33;

Z. Plaintiffs further allege that Willis is claiming “the right to recapture at least half of the copyrights in each of the Compositions.” Compl. ¶34;

AA. In so doing, Willis is “ignoring the existence of other people listed as writers of the Compositions to claim that he alone wrote all of their lyrics.” Compl. ¶35;

1 BB. Although Willis has no right to any portion of the copyrights, and the statute of
2 limitations and equitable doctrines preclude him from disputing authorship
3 attribution” but in “the event it is found otherwise,” then the maximum reversionary
4 share of copyright should be governed by, and be equal to, the percentage of royalties
5 set forth in the Agreements” which Willis received “as his compensation for services
6 rendered.” Compl. ¶36;

7 CC. Such percentages ranged from 12% to 20%. Compl. ¶37; and

8 DD. Willis cannot terminate the existing licenses and derivative works authorized by
9 Plaintiffs which existed prior to the terminations. Compl. ¶38.

10 ARGUMENT

11 I. PLAINTIFFS’ THREE CONTENTIONS AS TO THE VALIDITY OF THE NOTICE 12 EACH FAIL TO SET FORTH A CLAIM FOR WHICH RELIEF CAN BE GRANTED

13 A. Section 203(a)(1) of The Copyright Act Unambiguously Provides Willis with the 14 Right to Terminate the Grants Solely Executed by Him

15 When statutory language is clear and the statutory scheme is coherent and consistent, a court
16 may not make further inquiries that obstruct the plain language. *See Barnhart v. Sigmon Coal Co.*,
17 534 U.S. 438, 450 (2002). “As in all statutory construction cases, we begin with the language of the
18 statute. The first step is to determine whether the language at issue has a plain and unambiguous
19 meaning with regard to the particular dispute in the case”. *Id.*; *see Clark v. Capital Credit* 460 F.3d
20 1162, 1168 (9th Cir 2006) (“Well-established canons of statutory construction provide that any
21 inquiry into the scope and meaning of a statute must begin with the text of the statute itself); *Estate*
22 *of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (“When a statute speaks with clarity to
23 an issue judicial inquiry into its meaning, in all but the most extraordinary circumstances, is
24 finished.”); *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1207 (9th Cir. 2010), *cert. granted*,
25 — U.S. —, 131 S.Ct. 2874, 179 L.Ed.2d 1187 (2011) (“As always,” the “starting point is the
26 plain language of the statute ... [i]f the plain meaning of the statute is unambiguous, that meaning is
27 controlling.” *Id.*

1 In their Complaint, Plaintiffs acknowledge that Willis entered into a series of separate grants
2 of his copyright interests to CSP with respect to the Compositions, and that the other putative
3 authors entered into other separate agreements with Scorpio with respect to their interests in the
4 Compositions. Plaintiffs then conclude that because the affected Compositions are joint works,
5 Willis is “neither the sole grantor nor only author of any of the Compositions and hence, he is not a
6 ‘majority of the authors’”, and therefore Willis “could not terminate the copyright assignments for
7 any of the Compositions without at least one other writer joining him for such Composition”, so that
8 Willis’ termination of the copyright assignments is “void as to all of the Compositions.”

9 In short, according to Plaintiffs, to have a valid termination of a joint work under Section
10 203(a)(1) what is required is a majority of the authors of the work who executed the several grants
11 related to the joint work, even if such grants were separately executed and with separate grantees. In
12 other words, according to the Plaintiffs, the term grant as used in Section 203(a)(1) essentially means
13 “collective grants,” *i.e.*, all the grants related to the joint work affected by the termination. However,
14 in support of their interpretation, the Plaintiffs have conflated the statutory requirement of a majority
15 of the authors who executed a particular grant being terminated, with the majority of the authors who
16 wrote the work.

17 It is respectfully submitted that Plaintiffs are misreading the clear and unambiguous language
18 of Section 203(a)(1), the applicable portion of which reads as follows:

19 In the case of a grant executed by one author, termination of the grant may be
20 effected by that author. In the case of a grant executed by two or more authors of a
21 joint work, termination of the grant may be effected by a majority of the authors who
executed it. (emphasis added).

22 17 U.S.C. §203(a)(1). The term “grant” is used in the singular, not the plural, and the phrase
23 “executed it” refers to the grant in the singular not the plural as confirmed by the word “it” as
24 opposed to the word “them,” which would have had to been employed if the term “grant” was
25 intended, as alleged by Plaintiffs, to include multiple or separate grants by the other authors of a joint
26 work. Even the Copyright Office understood that the term “grant” was used in the singular and not
27 the plural sense with respect to a joint work, when the Copyright Office required in its regulations

1 related to the notice of termination provided, *inter alia*, “in the case of a joint work, the authors who
2 executed the grant being terminated”. See 37 C.F.R. §201.10(b)(2)(iv) (emphasis added).

3 Moreover, the operative words of the entire Section 203 relating to the termination provisions
4 are “the grant” and not “joint authors” or “collective grants” “or “several grants” or similar terms
5 that denote plural grants, no matter how much Plaintiffs may try to justify their argument. The term
6 “grant” is always used in the singular and not the plural sense. See, e.g., 17 U.S.C. §203(a)(1) which
7 states: “In the case of a grant executed by one author, termination of the grant may be effected by
8 that author ...”; 17 U.S.C §203(a)(3) which states: “Termination of the grant may be effected at any
9 time during a period of five years beginning at the end of thirty-five years from the date of execution
10 of the grant; or, if the grant covers the right of publication of the work, the period begins at the end
11 of thirty-five years from the date of publication of the work under the grant or at the end of forty
12 years from the date of execution of the grant, whichever term ends earlier.” (emphasis added).

13 Similarly, the regulations of the Copyright Office as set out in 37 C.F.R. §201.10, which sets
14 out the requirements for filing a termination notice under Section 203 does not even acknowledge or
15 accept that the phrase “the grant” also means “collective grants” or any other similar term that
16 denotes plural grants, but focuses only on the grant (singular) rather than the number of authors of a
17 joint work as the operative word. See, e.g., 37 C.F.R §201.10(b)(2) as to what the notice should
18 provide, states:

19 (ii) The name of each grantee whose rights are being terminated, or the grantee's
20 successor in title, and each address at which service of the notice is being made;

21 (iii) The date of execution of the grant being terminated and, if the grant covered the
22 right of publication of a work the date of publication of the work under the grant; (iv)
23 For each work to which the notice of termination applies, the title of the work and the
24 name of the author or, in the case of a joint work, the authors who executed the grant
being terminated; and, if possible and practicable, the original copyright registration
25 number; (v) A brief statement reasonably identifying the grant to which the notice of
26 termination applies;” (emphasis added).

25 In short, as indicated above, both the statutory scheme and the related regulations
26 manifest a coherent and consistent understanding of the term “grant,” as singular not plural,
27 in the context of a joint work. Indeed, Plaintiffs’ unreasonable proffered interpretation
28

1 cannot be reconciled with the other statutory provisions. For example, under Plaintiffs’
2 theory there would be no way to determine the date of “the grant” being terminated (and thus
3 the effective date of termination which runs therefrom) or the dates by which the Notice of
4 Termination must be served (which likewise is established by reference to the date of
5 execution of “the grant”).

6 Although there do not appear to be any cases that have yet addressed this specific issue, the
7 following excerpt from the frequently cited and well respected treatise, Melville B. Nimmer & David
8 Nimmer, Nimmer on Copyright (2004), is both instructive and persuasive. In volume 3,
9 §11.03[A][1], at pages 11-38, the following example is given:

10 Suppose that a work is written by five joint authors, only three of whom join in
11 executing a grant either of their interest in the copyright or of a non exclusive license
12 of the work. Any two of the three executing joint authors may terminate the grant. It
13 would not be sufficient for the two non executing joint authors to join only one
14 executing joint author for termination purposes. This is for the reason that the three
15 together would not constitute a majority of the authors who executed the grant. If
16 two of the three executing joint authors join in a termination (regardless of how many
17 authors wrote the work) they thereby terminate the rights granted by the third
18 executing joint author. It is the grant per se, and not merely the terminating authors’
19 respective grant of rights therein, that is terminated. A termination by two of the
20 three executing joint authors also affects the rights of the remaining joint authors
21 who neither joined in the original execution of the grant nor in its subsequent
22 termination. Whatever rights were properly conveyed in a joint work are terminated
23 if the requisite number of authors who made the grant join in the termination. This is
24 true even though the grant and its termination may affect (either favorably or
25 adversely) the rights of the non granting joint authors.” (emphasis added).

26 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §11.03[A][1] (2004). Such a
27 reading of the statute is likewise wholly supported by and consistent with the principles of co-
28 ownership of copyright, and the divisibility of copyright rights, under which it is well-established
that joint authors of a work are co-owners of that copyright, with each enjoying the right and ability
to independently license and assign their rights in such copyright to third parties. *See e.g.*,
§201(d)(2) of the Copyright Act, 17 U.S.C. §201(d)(2) (“any of the exclusive rights comprised in a
copyright ... may be transferred ... and owned separately. The owner of any particular exclusive
right is entitled, to the extent of that right, to all of the protections and remedies accorded to the
copyright owner by this title”); *Eagle Rock Entm’t v. Coming Home Productions, Inc.*, No. CV 03-

571, 2004 WL 5642002, at *13 (C.D. Ca. Sep. 1, 2004) (noting that “joint authors co-own the copyright; they are joint owners of the work in undivided shares” and thus, “a joint owner can transfer his interest in the joint work to a third-party”).

Indeed, it for this very reason that oftentimes there are two or more publisher/copyright owners of a given musical composition, as the songwriters separately assign their copyright interests to different publishers. For example, assume three writers create a musical work. Songwriter A has a relationship with Warner/Chappell Music and assigns his one-third copyright interest in the song to Warner/Chappell; songwriter B assigns his one-third interest to EMI Music Publishing, and songwriter C assigns his one-third interests in the copyright to Sony Music Publishing, making Warner, EMI and Sony equal co-owners of the copyrights in the musical work. Warner’s interests in the song solely derive from Writer A. Writers B and C have not conveyed anything to Warner. Writer A, as the sole author who executed the grant of rights to Warner, may thus, on his own, terminate that specific grant of his one-third interests in the copyright to Warner. Such is the exact circumstance here, where Willis executed a grant of his copyright interests in the Compositions to CSM, and, according to the Complaint, the other purported writers of the Compositions executed separate grants of their copyright interests in the Compositions to Scorpio.

The language of Section 203(a)(1) is clear, plain and unambiguous with respect to the termination of a grant of a joint work, viz., it is the majority of the authors who executed the grant being terminated, rather than the majority of the authors who wrote the work, that is the requirement for a valid notice of termination. In the instant action, Willis was the only joint work author who executed each particular grant that is being terminated. Willis, as the only author who executed the Grant is well within his statutory rights to terminate it.

B. Plaintiffs’ Conclusory “Work Made for Hire” Allegations Are Refuted by Documents Referred to in the Complaint and Are Otherwise Insufficient to Set Forth a Plausible Claim for Relief.

The U.S. Copyright Act provides that in the case of a “work made for hire,” the “employer of other person for whom the work was prepared is considered the author for purposes of this title.” 17 U.S.C. §201(b). The Copyright Act further provides that the termination provisions at issue in this

1 action are not applicable to “works made for hire.” Based upon these provisions, Plaintiffs contend
2 that the Notice is a nullity because the Compositions were allegedly works made for hire.

3 The U.S. Copyright Act provides a very specific, and limiting, definition of a “work made for
4 hire” as follows:

5 A work made for hire is –

6 (1) a work prepared by an employee within the scope of his or her employment; or

7 (2) a work specially ordered or commissioned for use as a contribution to a
8 collective work, as a part of a motion picture or other audiovisual work, as a
9 translation, as a supplementary work, as a compilation, as an instructional text, as
10 a test, as answer material for a test, or as an atlas, if the parties expressly agree in
11 a written instrument signed by them that the work shall be considered a work
12 made for hire.

13 17 U.S.C. §101. Notwithstanding the Complaint’s conclusory allegations, the documents referred to
14 and relied upon in the Complaint establish the implausibility of any work for hire claim here.

15 While facts which are alleged in the complaint are presumed true on a motion to dismiss
16 under Fed .R. Civ. P. 12(b)(6), the Court need not “accept as true allegations that contradict matters
17 properly subject to judicial notice or by exhibit” or those which are “merely conclusory,” require
18 “unwarranted deductions” or “unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266
19 F.3d 979, 988 (9th Cir.2001), *amended on other grounds*, 275 F.3d 1187 (9th Cir. 2001); *see also*
20 *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003) (court need not accept as true unreasonable
21 inferences or conclusions of law cast in the form of factual allegations). Moreover, “in order to
22 ‘[p]revent[] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting...documents
23 upon which their claims are based,’ a court may consider a writing referenced in a complaint but not
24 explicitly incorporated therein if the complaint relies on the document and its authenticity is
25 unquestioned.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (court properly considered
26 defendant’s engagement letter on 12(b)(6) motion where plaintiff’s breach of contract complaint
27 explicitly referred to the engagement letter and the authenticity of the letter was not in dispute (citing
28 *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998), *superseded by statute on other grounds*,
as stated in Abrego v. Dow Chem. Co., 443 F.3d 676 (9th Cir. 2006)).

1 In ¶¶7 and 8 of the Complaint, Plaintiffs allege that between 1977 and 1979, Willis entered
2 into a series of agreements, under which he was “employed” by CSP and “hence a writer for hire
3 with no right in the copyrights” (*see* Compl. ¶26), and these agreements established Willis’ “writer
4 for hire status” (*see* Compl. ¶27).

5 In all, there were nine such agreements, with the post-1977 agreements compromising the
6 Grants identified in the Notice, all of which were identical except as to their dates, the songs
7 involved, the rates of royalty compensation and the signatory on behalf of CSP. Although Plaintiffs
8 conspicuously did not attach a copy of one of the Grants to the Complaint in this action, Plaintiff
9 CSP, in a separate recent civil action in the United States District Court for the Southern District of
10 New York, has acknowledged the identical nature of the terms of the Grants, and filed a copy of one
11 of the Grants with the Court in that Action. *See* Caplan Decl., ¶4, and Ex. B thereto (copy of
12 Affidavit of Stewart L. Levy dated June 8, 2011 and Exhibit E annexed thereto [hereinafter referred
13 to as the “Levy Affidavit.”]). A review of Exhibit E to the Levy Affidavit (the Grant for the
14 Composition *Y.M.C.A.*) establishes that, contrary to the allegations of the Complaint, the Grants do
15 not have any express provisions therein that use the phrase or term “writer for hire” or “employee”,
16 or “work made for hire”, nor are there any provisions therein upon which an “employee” or “writer
17 for hire” status, or that the Compositions were “works made for hire,” are implied, or that such terms
18 could even be reasonably inferred. Defendant respectfully requests that the Court take Judicial
19 Notice of the Levy Affidavit, which was filed publicly in the United States District Court for the
20 Southern District of New York, and thus it is properly considered since, “[o]n a motion to dismiss,
21 [a court] may take judicial notice of matters of public record outside the pleadings.” *MGIC Indem.*
22 *Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (holding that district court properly took
23 judicial notice of documents from a prior proceeding – motion to dismiss and supporting
24 memorandum of law – when considering a motion to dismiss).

25 Given the Copyright Act’s requirement that the parties “expressly agree in a written
26 instrument signed by them that the work shall be considered a work made for hire,” 17 U.S.C. §101,
27 the absence of any such express provision in the Grants precludes, as a matter of law, any claim by

1 Plaintiffs that the Compositions were specially ordered or commissioned as works made for hire,
2 under the second prong of the work for hire definition. 17 U.S.C. §101(2). Accordingly, Plaintiffs’
3 contention that the Compositions were works made for hire, can only be based upon the first prong
4 of the work for hire definition, namely that Willis prepared the Compositions while he was an
5 “employee” of CSM and “within the scope of his or her employment.” 17 U.S.C. §101(1).

6 The actual terms of the Grant directly contradict Plaintiffs’ contentions. First, the wording of
7 the Grant makes clear that Willis’ contribution to the Compositions occurred prior to the execution
8 of the Grant, stating in its first sentence, “Whereas, [Willis] has translated the lyrics of or created
9 new lyrics for certain compositions...” Thus, the Grant is directly contrary to Plaintiffs’ allegation
10 that Plaintiffs “pursuant to the agreements... hired defendant to translate the lyrics of and/or create
11 new lyrics for” the Compositions. *See* Compl. ¶8. Moreover, there is no mention of “employment,”
12 or any matter even remotely related to an employment relationship in the Grant. To the contrary, the
13 Grant contains typical language consistent with the assignment of copyright interests from an author
14 to a publisher, stating:

15 [Willis] hereby sells, assigns, transfers and delivers to Publisher, its successors, and
16 assigns, the Adaptation [including the title and lyrics thereof] ... together with the
17 worldwide copyright thereof and the right to secure and hold any and all extensions
and renewals thereof of such copyright throughout the entire world, together with all
of his rights, title and interest, both legal and equitable therein....

18 Just as Plaintiffs’ factual allegations concerning the Grants are implausible, Plaintiffs’ other
19 factual allegations fall far short of the settled and established standards to ascertain whether there is
20 an employee relationship in connection with works made for hire under the Copyright Act, which
21 have been set forth by the U.S. Supreme Court in *Community for Creative Non-Violence v. Reid*,
22 490 U.S. 730 (1989), hereinafter “*CCNV v. Reid*”, as well as in the opinion of the Ninth Circuit in
23 *Dumas v. Gommerman*, 865 F.2d 1093 (1989), and in the opinion of the Second Circuit in *Aymes v.*
24 *Bonelli*, 980 F.2d 857 (1992). Specifically, in *CCNV v. Reid*, the Supreme Court held that to
25 determine whether a work is a “work made for hire” within the §101 definition, a court should first
26 apply general common law of agency principles to ascertain whether the work was prepared by an
27 employee or an independent contractor, and, depending upon the outcome, should then apply either

§101(1), for employees, or §101(2), for independent contractors. *Id.* at 740-41. However, the Supreme Court made it very clear that regardless of whether the work was prepared by an employee or an independent contractor, supervision or control over creation of the work alone is not controlling. *Id.* at 741-42.

Where the work is claimed to have been prepared by an “employee,” the Supreme Court in *CCNV v. Reid*, identified certain factors that characterize an “employer-employee” relationship as defined by agency law, *Id.* at 751-52, but the Court also noted that no single factor is determinative. *Id.* at 752. The *Reid* factors are as follows:

[1] the hiring party's right to control the manner and means by which the product is accomplished ... ; [2] the skill required; [3] the source of the instrumentalities and tools; [4] the location of the work; [5] the duration of the relationship between the parties; [6] whether the hiring party has the right to assign additional projects to the hired party; [7] the extent of the hired party's discretion over when and how long to work; [8] the method of payment; [9] the hired party's role in hiring and paying assistants; [10] whether the work is part of the regular business of the hiring party; [11] whether the hiring party is in business; [12] the provision of employee benefits; and [13] the tax treatment of the hired party.

Id. at 751-52. However, as noted by the Second Circuit in *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992):

Reid established that no one factor was dispositive, but gave no direction concerning how the factors were to be weighed. It does not necessarily follow that because no one factor is dispositive all factors are equally important, or indeed that all factors will have relevance in every case. The factors should not merely be tallied but should be weighed according to their significance in the case.

The *Aymes* Court then set forth five factors always relevant to a work-for-hire analysis; namely, the provision of employee benefits, the tax treatment of the hired party, whether the alleged hiring party has the right to assign additional projects to the hired party, the means and manner of creation, and the skill required. *Id.* at 861. As the *Aymes* Court stated “These factors will almost always be relevant and should be given more weight in the analysis, because they will usually be highly probative of the true nature of the employment relationship”. *Id.* at 861. In the *Aymes* case, the Court then found that while the right to control and assign additional work, might be important in some cases depending on the degree to which the employer actually controlled the manner of the creation, these factors were outweighed primarily by: (1) the “peculiar expertise or creative genius”

1 required, viz., a highly-skilled independent contractor, (2) the absence of any employee benefits,
2 e.g., health, unemployment, or life insurance benefits, and (3) also the failure to pay social security
3 taxes and withhold federal or state income taxes. *Id.* at 862-64.

4 The Ninth Circuit, in *Dumas v. Gommerman*, similarly places the emphasis of the employee
5 analysis upon traditional factors such as the payment of salary, employee benefits and tax treatment.
6 After engaging in an extensive review of the “works for hire” doctrine under the 1909 Copyright Act
7 and the 1976 Copyright Act,⁶ the Court concluded that “[o]ur analysis leads to a clear result in this
8 case. Only the works of formal, salaried employees are covered by §101(1). Only certain types of
9 specially commissioned works qualify as “work made for hire” under §101(2).” *Id.* at 1102. While
10 the limitation to “formal, salaried, employees,” was subsequently rejected as too limiting by *CCNV*
11 *v. Reid*, the following factors set forth in *Dumas* mirrors the *Reid* factors:

12 When the issue is raised in the context of deciding the parties' status when the
13 relationship is ambiguous, relevant factors will be such things as (1) whether the
14 artist worked in his or her own studio or on the premises of the buyer; (2) whether
15 the buyer is in the regular business of creating works of the type purchased; (3)
16 whether the artist works for several buyers at a time, or exclusively for one; (4)
17 whether the buyer retains authority to assign additional projects to the artist; (5) the
18 tax treatment of the relationship by the parties; (6) whether the artist is hired through
19 the channels the buyer customarily uses for hiring new employees; (7) whether the
20 artist is paid a salary or wages, or is paid a flat fee; and (8) whether the artist obtains
21 from the buyer all benefits customarily extended to its regular employees. While the
22 degree of control and input exercised by the buyer may be relevant to an inquiry into
23 joint authorship, it will not ordinarily be relevant in determining the employment
24 status of the artist, just as this factor is not relevant in distinguishing between, for
25 example, in-house and outside counsel.”

21 ⁶ In doing so, the Court noted the seriousness of a work for hire determination given its impact
22 upon the termination provisions of the Copyright Act: “A more important effect of section 201(b) is
23 to eliminate termination rights that the employee would otherwise have if ownership vested in the
24 employer by transfer, rather than ab initio. 17 U.S.C. §203(a) provides that for works other than
25 those made for hire, a transfer or license of the copyright or any right under the copyright is subject
26 to termination 35 years after the transfer or license is made. This provision was intended to adjust
27 for “the unequal bargaining position of authors, resulting in part from the impossibility of
determining a work's value until it has been exploited.” H.R.Rep. No. 94-1476, 94th Cong., 2d Sess.
124 (1976), U.S. Code Cong. & Admin. News 1976, p. 5740. Designating a work as “made for hire”
irretrievably takes away more than just the artist's copyright; it also deprives him or her of the
opportunity to renegotiate the transfer after the market value of the work has been more precisely
determined.” *Id.* at p.XXX (footnote omitted).

1 *Id.* at 1105. Given these established and specific requirements, the allegations of the Complaint do
2 not assert a plausible work for hire claim here. First, the express terms of the Grants themselves
3 belie any such contention, as there is no reference whatsoever in the Grants to an employment
4 relationship of any kind. Surely, if Willis were an “employee” or a “writer for hire” or that the
5 Compositions were “works made for hire”, there would have been such express language in the
6 document that confirmed such status or designation, or at least even some language that impliedly
7 confirms such status or designation or from which such status or designation could reasonably be
8 inferred.

9 Second, and further contradicting the conclusory allegations of the Complaint, the
10 registrations of the copyrights in the Compositions with the U.S. Copyright Office (prepared and
11 submitted by Plaintiffs) identify and describe Willis as an “author” of the Compositions and
12 expressly disclaim that his contributions were works made for hire. A certified copy the registration
13 for the Composition *Y.M.C.A.* is annexed to the Caplan Decl. as Exhibit C. Just as with the Levy
14 Affidavit, the Court may take judicial notice of these publicly filed documents and consider them on
15 this motion. *See Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1146 (9th Cir. 2008)
16 (taking judicial notice of copyright registration records from U.S. Copyright Office).

17 As noted in ¶¶11 and 12 of the Complaint, Plaintiffs state that “copyright registrations” in the
18 Copyright Office were filed for the Compositions and these registrations “credited Willis as being
19 one of several writers on each of the compositions.” In all, as noted in the Notice, there are thirty
20 three (33) such registrations with respect to the works whose grants are being terminated.

21 Initially, it should be noted that each of these registrations were prepared and filed by CSP by
22 its then personnel or by its then attorneys. *See* Caplan Decl., Ex. C. These registrations were filed
23 over approximately a thirty months period between January 1, 1978, and June 1980.

1 As acknowledged in the Complaint at ¶12, the “authors” are identified as Willis and the other
2 putative writers.⁷ If the Compositions had been works made for hire, the employer, here CSM,
3 would have been identified as the author on the registration. *See* 17 U.S.C. §201. Moreover, and
4 consistent with the fact that the Compositions were not works for hire, in response to the question in
5 Section 2 on the copyright registration form that asks, “Was the author’s contribution to the work a
6 ‘work made for hire’”, Plaintiffs checked “No” for Willis, as well as for each of the other putative
7 authors. Caplan Decl., Ex. C.

8 Notwithstanding the conclusive documentary evidence cited above – the Grants themselves
9 and the contemporaneously filed Registrations – which conclusively confirm that Willis was not an
10 “employee” or a “writer for hire”, or that the Compositions were “works made for hire”, Plaintiffs
11 nevertheless assert allegations of purported facts which they claim establish such status or such
12 designation.

13 Fatal to Plaintiff’s claim, these very documents referred to and relied upon in the Complaint
14 belies and contradicts the “factual” allegations made in the Complaint to support their position that
15 Willis was an “employee.” Specifically, Plaintiffs allege that under the Grants:

16 CSP “hired [Willis] to translate the lyrics of and/or create new lyrics for certain
17 musical compositions.” Compl. ¶8;

18 CSP “instructed Willis concerning what English lyrics it desired him to provide, and
19 supervised [Willis’] work in this regard by among other things, providing him with,
20 and paying for the facilities in which he rendered his services.” Compl. ¶9;

21 Willis was “employed” by CSP and “hence he is a writer for hire with no right in the
22 copyrights” for which he provided “some English lyrics.” Compl. ¶26; and,

23 Such Agreements “established Willis’ writer for hire status.” Compl. ¶27.

24 Then, perhaps realizing the actual provisions of the Grants do not support these allegations of
25 employment, Plaintiffs further allege that:

26 ⁷ While it is not germane to the instant motion, Defendant contends that Henri Belolo, one of
27 the three authors listed on the copyright registrations at issue, had no role in the creation of the
28 Compositions.

1 “The circumstances pursuant to which [Willis] rendered his services confirm that he
2 functioned as an employee” of CSP. Compl.¶27; and,

3 CSP, as part of its regular business representing Scorpio in the U.S. “supervised and
4 controlled the manner and means by which [Willis] worked including its location and
5 duration, as well as the substance and meaning of the lyrics to be provided.” Compl.
6 ¶28.

7 As is evident from these allegations, Plaintiffs have merely pleaded labels and conclusions
8 and a formulaic recitation of purported facts to establish that Willis was an “employee” as such term
9 is understood in the context of the Copyright Act. This is not sufficient. As stated in *Bell Atl. Corp.*
10 *v. Twombly*, 550 U.S. 544, 555-56 (2007):

11 While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
12 detailed factual allegations, a plaintiff's obligation to provide the grounds of his
13 entitlement to relief requires more than labels and conclusions, and a formulaic
14 recitation of the elements of a cause of action will not do. Factual allegations must
15 be enough to raise a right to relief above the speculative level, on the assumption that
16 all the allegations in the complaint are true (even if doubtful in fact) (citations,
17 internal quotations and alterations omitted).

18 Additionally, writing for the majority, Justice Souter explained:

19 “we do not require heightened fact pleading of specifics, but only enough facts to
20 state a claim to relief that is plausible on its face. Because the plaintiffs here have
21 not nudged their claims across the line from conceivable to plausible, their complaint
22 must be dismissed.” *Id.* at 570.

23 Also, as stated in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), “[T]he tenet that a court
24 must accept as true all of the allegations contained in a complaint is inapplicable to legal
25 conclusions.” As a result, “a court considering a motion to dismiss can choose to begin by
26 identifying pleadings that, because they are no more than conclusions, are not entitled to the
27 assumption of truth. While legal conclusions can provide the framework of a complaint, they must
28 be supported by factual allegations.” *Ashcroft v. Iqbal*, *supra*, 129 S.Ct. at 1950.

Without conceding that Plaintiffs have pleaded more than labels and conclusions, perhaps the
closest Plaintiffs come to pleading “factual allegations” are those contained in Complaint ¶9, that
CSP “instructed Willis concerning what English lyrics it desired him to provide, and supervised
[Willis’] work in this regard by among other things, providing him with, and paying for the facilities
in which he rendered his services,” and in Complaint ¶28, that CSP, as part of its regular business

1 representing Scorpio in the U.S. “supervised and controlled the manner and means by which [Willis]
2 worked including its location and duration, as well as the substance and meaning of the lyrics to be
3 provided.”

4 Glaringly absent from the Complaint’s allegations are any factual allegations concerning any
5 of the *Reid* factors, other than control, and in particular the five essential factors set forth in *Aymes*
6 and *Dumas*. Nowhere in the Complaint are there any allegations concerning the provision of
7 employee benefits to Willis by Plaintiffs, the tax treatment of the payments made to Willis, whether
8 CSM had the right to assign additional projects to Willis, specific allegations concerning the means
9 and manner of creation, and the skill required. *See Aymes*, 980 F.2d at 861. The absence of even
10 factual allegations as to these essential elements, coupled with the documentary evidence directly
11 contradicting a work for hire claim, makes Plaintiffs’ claim implausible.

12 In any event, even with respect to the allegations that do appear in the Complaint, no details
13 are provided as to any of these “facts” and the “factual allegations” of the Complaint are simply not
14 sufficient so that “any reasonable inferences drawn from them” could even allow a court to accept as
15 plausible that Willis was an “employee” of CSP or that the Compositions were “works made for
16 hire,” and it is clear that there is no “reasonable expectation” that discovery could establish Willis’
17 status as an “employee” based upon these conclusory, unsupported, allegations. *Cf. Johnson v.*
18 *Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008), *Twombly*, 550 U.S. at 556.
19 Perhaps one of the best indications that Willis was an independent contractor and not an employee, is
20 the fact that there were nine separate agreements entered into over a thirty plus month period for the
21 works that Willis wrote rather than one over-all agreement that covered all his works. Surely, if
22 Willis were an “employee” there would or should have been one all inclusive agreement that covered
23 all these works, or even a provision therein or in one of the nine Agreements that gave CSP the right
24 to assign additional projects to Willis (one of the *Reid* factors for which no allegations appear in the
25 Complaint); instead there were only the nine separate Agreements executed over a thirty month
26 period. Of the *Reid* factors, Plaintiffs solely allege “supervision and control,” which allegations

1 themselves are barren of any specifics or details, and, as noted in *Aymes* and *Dumas*, is insufficient,
2 by itself, to sustain a finding of an employee relationship.

3 The insufficient allegations of the Complaint, which allegations are even contradicted by the
4 documents relied upon by Plaintiffs, utterly fails, as matter of law, to set forth a plausible claim that
5 Willis was an employee of CSP, or that the Compositions were otherwise works made for hire.

6 **C. Plaintiffs' Attempt to Avoid the Merits of Their Work Made for Hire Claim**
7 **through Time-Related Defenses Is Factually and Legally Meritless**

8 In *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir.2008), the Court
9 held that dismissal is proper where there is either a lack of a cognizable legal theory or the absence
10 of sufficient facts alleged under a cognizable legal claim.

11 The sole factual allegations supporting Plaintiffs' time-based attack on the validity of the
12 Notice are their allegations that Willis entered into the Grants more than thirty years ago and, during
13 that time has been paid hundreds of thousands of dollars under the terms of those Grants. Compl.
14 ¶¶31-32. Plaintiffs then conclude, based solely upon those allegations, that, "equitable concepts
15 such as laches and estoppel, as well as the relevant statute of limitations, preclude any attempt by
16 defendant Willis to contest the validity of his status as a writer for hire." Compl. ¶33.

17 Plaintiffs have not alleged any factual basis for the application of any of these "equitable
18 concepts." See *Estate of Amero v. City of Oakland*, No. 10-16152, 2011 WL 3195372, at *4 (9th
19 Cir. Jul. 28, 2011) ("In this circuit, the plaintiff carries the burden of pleading and proving the
20 following elements of equitable estoppel: (1) knowledge of the true facts by the party to be estopped,
21 (2) intent to induce reliance or actions giving rise to a belief in that intent, (3) ignorance of the true
22 facts by the relying party, and (4) detrimental reliance."); *Kling v. Hallmark Cards, Inc.*, 225 F.3d
23 1030 (9th Cir. 2000) (To obtain a judgment on the affirmative defense of laches, a defendant must
24 prove both an unreasonable delay by the plaintiff and prejudice to itself.). Plaintiffs do not even
25 attempt to allege any of these essential factual elements. All Plaintiffs allege is that Willis,
26 rightfully, received royalties under the terms of the Grants for 30 years. Whether or not Willis
27 served the Notice, and whether or not Willis contends he created the Compositions as an author and

1 not a worker for hire, Willis was entitled to receive those payments, and Plaintiffs were contractually
2 obligated to make them. The conduct alleged – receiving royalty payment for 30 years – provides no
3 basis to preclude Willis from contesting Plaintiff’s work-for-hire claim.

4 Similarly, there is no basis to assert that Willis cannot contest Plaintiffs’ work for hire claim
5 on the basis of a statute of limitations. First, the Complaint contains no allegations of time as to
6 when Plaintiffs contend that Willis’ “claim” to contest such status accrued for limitations purposes.
7 In fact, the Complaint does not even specify what statute of limitations should be applied. Such
8 allegations are wholly insufficient to state a claim for relief.

9 As a factual matter, it was not until after Willis served and filed his Termination Notice dated
10 January 21, 2011, that the Plaintiffs ever claimed that Willis was an “employee” or a “writer for
11 hire”. In fact, as detailed above, both the Grants themselves and the copyright registrations for the
12 Compositions evidence that Willis WAS NOT an employee or worker for hire of CSP. In other
13 words, the total time period during which this “issue” has been in play is approximately six months.
14 Purely from a time line basis, it is difficult to understand how laches and the statute of limitations
15 have any bearing or relevancy to preclude Willis from challenging Plaintiffs’ assertion that he was
16 an “employee” or “writer for hire.” Plaintiffs can cite no statute or case law that, given the time line,
17 would in any way support their assertion.

18 Willis has simply not slept on any of his rights; there has been no reasonable reliance by
19 Plaintiffs upon any improper conduct of Willis, and Willis’ statutory rights under the termination
20 provisions of the Copyright Act did not even vest until he served the Notice less than one year ago.

21 * * *

22 In sum, there is no basis for any of the three grounds set forth in the Complaint in support of
23 Plaintiffs’ claim that the Notice is invalid. Willis enjoys the statutory right to serve a Notice of
24 Termination of the Grants, which he alone executed; Willis was not an employee or otherwise a
25 worker for hire of CSP; and Willis’ Notice is timely. Accordingly, the Complaint does not set forth
26 a plausible claim for a Declaration that the Notice is not valid.

1 **II. PLAINTIFFS' ALTERNATIVE CONTENTIONS CONCERNING THE EFFECTS**
2 **OF TERMINATION LIKEWISE FAIL TO SET FORTH A CLAIM FOR WHICH**
3 **RELIEF CAN BE GRANTED**

4 In the Complaint, Plaintiffs assert that in the event the Notice is found to be valid and
5 effective, Willis' rights thereunder should nevertheless be limited in two respects. First, Plaintiffs
6 assert, in direct contravention of the express terms and purposes of the statute that Willis' recaptured
7 interests should be limited to the royalty percentages set forth in the Grants. Next, Plaintiffs claim
8 that a dispute exists between the parties as to the effect of termination upon existing licenses. As to
9 the first contention, Plaintiffs are wrong as a matter of law. As to the second contention, Plaintiffs
10 are wrong that there is any dispute between the parties.

11 With respect to both of these contentions, §203(b) of the Copyright Act unambiguously
12 addressed them, which provides in pertinent part:

13 (b) Effect of Termination – Upon the effective date of termination, all rights under
14 this title [i.e. the Copyright Act] that were covered by the terminated grants revert to
15 the author ..., but with the following limitations:

16 (1) A derivative work prepared under authority of the grant before its
17 termination may continue to be utilized under the terms of the grant after its
18 termination...

19 17 U.S.C. §203(b).

20 Plaintiffs' absurd argument that the royalty share set forth in the Grant is the proper measure
21 of Plaintiffs' copyright interests in the respective Composition simply ignores the express language
22 of the Copyright Act, which provides that "all" copyrights that were covered by the terminated grant
23 revert to the author. In this instance, all of Willis' copyright interests in the Compositions were
24 covered by the Grants, and thus all of those copyright interests will revert to him upon termination of
25 that Grant, regardless of the income percentages set forth in the Grants.

26 Finally, as is clear from the Notice and the pre-litigation letters between the parties (all of
27 which are referred to in the Complaint), Willis has not and does not dispute that existing derivative
28 works may continue to be exploited under existing licenses, after termination, under the terms of the
Grant and those existing licenses. This is simply the law under the so-called 'derivative works
exception' of the Copyright Act. There is no dispute that is ripe for relief from this Court.

1 **CONCLUSION**

2 For all of the foregoing reasons, Defendant respectfully requests that this Court dismiss the
3 Plaintiffs' Complaint in its entirety, and that Defendants be granted such other and further relief that
4 to this Court seems just, proper and equitable.

5 DATED: September 26, 2011

Respectfully Submitted,

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7
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