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**SUPPLEMENTAL MEMORANDUM**

Pursuant to the Court’s July 28, 2020, Scheduling Notice (Doc. 58), Defendants respectfully submit this Supplemental Memorandum.

**1. Plaintiffs’ Claim Fails because the Unprotected Ideas Underlying the Allegedly Copied Words Merge with Those Words, Rendering Them Unprotectable Too**

“When the ‘idea’ and its ‘expression’ are . . . inseparable, copying the ‘expression’ will not be barred, since protecting the ‘expression’ in such circumstances would confer a monopoly of the ‘idea’ upon the copyright owner . . . .” [Herbert Rosenthal Jewelry Corp. v. Kalpakian](#), 446 F.2d 738, 742 (9th Cir. 1971).<sup>1</sup> Here, Plaintiffs admit that players play and haters hate are each commonplace phrases. [Complaint \(Doc. 1\) at 5, ¶¶ 21-22](#).<sup>2</sup> But Plaintiffs allege they are the first to “combin[e] playas/players playing along with hatas/haters hating” to “describe[ ] two separate people – one playa who engages in playing and one hater who engages in hating.” [Id. at 5, ¶¶ 20-22](#) (emphasis added). However, the (1) *idea* of one player who engages in playing and one hater who engages in hating is inseparable from (2) the *allegedly copied words*, namely players play and haters hate.

“The key question always is: Are the works substantially similar beyond the fact that they depict the same idea?” [Mattel, Inc. v. MGA Entm’t, Inc.](#), 616 F.3d 904,

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<sup>1</sup> See, also [Rice v. Fox Broad. Co.](#), 330 F.3d 1170, 1174–75 (9th Cir. 2003) (same), *overruled on other grounds by* [Skidmore v. Led Zeppelin](#), 952 F.3d 1051 (9th Cir. 2020). “A closely related limiting doctrine to merger, *scenes a faire*, holds that expressions indispensable and naturally associated with the treatment of a given idea ‘are treated like ideas and are therefore not protected by copyright.’” [Rice](#), 330 F.3d at 1175 (quoting [Apple Computer Corp. v. Microsoft Corp.](#), 35 F.3d 1435, 1444 (9th Cir.1994)); [Ets-Hokin v. Skyy Spirits, Inc.](#), 225 F.3d 1068, 1082 (9th Cir. 2000) (same); [Data E. USA, Inc. v. Epyx, Inc.](#), 862 F.2d 204, 208-09 (9th Cir. 1988) (video games’ similarities inseparable from idea of game based on karate).

<sup>2</sup> Plaintiffs allege that *Shake It Off*’s lyrics about heartbreakers breaking and fakers faking are also copied, but those words are not in Plaintiffs’ song.

1 [917 \(9th Cir. 2010\)](#). Here, the only similarity between Plaintiffs’ lyric (“Playas, they  
 2 gonna play / And haters, they gonna hate”) and *Shake It Off*’s lyric (“Cause the players  
 3 gonna play, play, play, play, play and the haters gonna hate, hate, hate, hate, hate”) is  
 4 the unprotectable idea that players play and haters hate.

5 Plaintiffs have tried generalizing the lyrics’ underlying idea to, e.g., “people  
 6 will do what they do,” and then arguing that players play and haters hate is only one  
 7 of many ways to convey that general idea. [Reply Brief \(9th Cir. Dkt. Entry 42\) at 19](#).  
 8 But Plaintiffs allege that the underlying idea is “two separate people – one playa who  
 9 engages in playing and one hater who engages in hating.” [Complaint at 5, ¶¶ 20-22](#).  
 10 Also, the extrinsic test requires substantial similarity in both idea and expression.  
 11 [Benay v. Warner Bros. Entm’t, 607 F.3d 620, 624 \(9th Cir. 2010\)](#), *overruled on other*  
 12 *grounds by Skidmore, 952 F.3d 1051*. The general concept that “people will do what  
 13 they will do” is not a substantial similarity in idea. Further, the merger doctrine would  
 14 be meaningless – and people could use copyrights to monopolize ideas – if the  
 15 doctrine could be avoided merely by attributing an abstract idea to the works. The  
 16 idea in [Kalpakian](#) was bee-shaped jewelry, not adornments inspired by nature. And  
 17 the idea here is “one playa who engages in playing and one hater who engages in  
 18 hating.” [Complaint at 5, ¶¶ 20-22](#). That idea is inseparable from players play and  
 19 haters hate and, accordingly, the allegedly copied words are unprotectable.

## 20 **2. Plaintiffs’ Selection and Arrangement Theory Fails as a Matter of Law**

### 21 **(a) Plaintiffs’ Decision to Combine Two Public Domain Elements –** 22 **Players Playing and Haters Hating – Is Not Copyrightable**

23 “[A] copyright plaintiff may argue infringement . . . based on original selection  
 24 and arrangement of unprotected elements.” [Skidmore, 952 F.3d 1051, 1074](#) (quoting  
 25 [Metcalf v. Bochco, 294 F.3d 1069, 1074 \(9th Cir. 2002\)](#), *overruled on other grounds*  
 26 *by Skidmore, 952 F.3d at 1051*). However, courts “have extended copyright protection  
 27 to ‘a combination of unprotectable elements . . . only if those elements are numerous  
 28 enough and their selection and arrangement original enough that their combination

1 constitutes an original work of authorship.” *Id.* at 1074 (quoting *Satava v. Lowry*,  
2 [323 F.3d 805, 811 \(9th Cir. 2003\)](#)). Plaintiffs’ allegation that they “originated the  
3 linguistic combination of playas/players playing along with hatas/haters hating”  
4 ([Complaint at 5, ¶ 23](#)) is not a plausible selection and arrangement claim.

5 First, Plaintiffs’ allegation that they combined two public domain phrases falls  
6 far short of the required selection and arrangement of “numerous” unprotectable  
7 elements. *Satava*, [323 F.3d at 811](#) (combination of six elements not “numerous  
8 enough”); *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, [345 F.3d 1140, 1147 \(9th](#)  
9 [Cir. 2003\)](#) (combination of four elements not sufficient); *Masterson v. Walt Disney*  
10 [Co.](#), No. 19-55650, [2020 WL 4435103, at \\*3 \(9th Cir. Aug. 3, 2020\)](#) (combination of  
11 five elements not sufficient; [Rule 12\(b\)\(6\)](#) dismissal affirmed); cf. *Metcalfe*, [294 F.3d](#)  
12 [at 1073-74](#) (approximately twenty “generic similarities” between script and television  
13 show created triable issue). Two is not “numerous” public domain elements.

14 Second, Plaintiffs’ claim of protection in combining just players play and haters  
15 hate, in the absence of “elements [that] are particularly selected and arranged[,]”  
16 amounts to nothing more than trying to copyright commonplace elements.” *Skidmore*,  
17 [952 F.3d at 1075](#). “Without such arrangement, there is no liability for [allegedly]  
18 taking ‘ideas and concepts’ from the plaintiff’s work, ‘even in combination.’” *Id.*  
19 (quoting *Rentmeester v. Nike, Inc.*, [883 F.3d 1111, 1123 \(9th Cir. 2018\)](#)), *overruled on*  
20 *other grounds by* *Skidmore*, [952 F.3d 1051](#)).

21 As a matter of established law, Plaintiffs’ allegation that they combined two  
22 public domain elements does not plead a plausible selection and arrangement claim.

23 **(b) Plaintiffs’ and Defendants’ Alleged Uses of these Public Domain**  
24 **Elements Are Different in Multiple Respects and, as a Result, Are**  
25 **Not Virtually Identical**

26 While substantial similarity is the standard, “for works where there is a narrow  
27 range of available creative choices, the defendant’s work would necessarily have to  
28 be ‘virtually identical’ to the plaintiff’s work in order to be substantially similar.”

1 [Skidmore, 952 F.3d at 1076 n.13](#). Because the ways to combine players play and  
2 haters hate are necessarily limited, virtual identity is required to state a plausible claim.  
3 Yet, the parties’ respective use of these public domain words is very different:

4 **Playas Gon’ Play**

**Shake It Off**

5 **Opening Lyrics**

6 “The hit maker  
7 The playas gon’ play  
8 Them haters gonna hate  
9 Them callers gonna call  
10 Them ballers gonna ball  
11 (Let ’em know)”

“I stay out too late, got nothing in my  
brain  
That’s what people say, that’s what  
people say  
I go on too many dates, but I can’t  
make them stay  
At least that’s what people say, that’s  
what people say”

14 **Chorus**

15 “Playas, they gonna play  
16 And haters, they gonna hate.  
17 Ballers, they gonna ball.  
18 Shot callers they gonna call.  
19 That ain’t got nothin’ to do  
20 With me and you  
21 That’s the way it is  
22 That’s the way it is”

“Cause the players gonna  
play, play, play, play, play  
And the haters gonna hate,  
hate, hate, hate, hate.  
Baby I’m just gonna shake,  
shake, shake, shake, shake,  
Shake it off.  
Shake it off.  
Heartbreakers gonna break,  
break, break, break, break  
And the fakers gonna fake,  
fake, fake, fake, fake.”

27 [Decl. \(Doc. 20-2\) at 1-2, ¶¶ 4-5, 7-8, & Exh. 2 \(Doc. 20-3\) at 11-13 & Exh. 4 \(Doc.](#)  
28 [20-3\) at 15; Notice of Lodging \(Doc. 20-5\) at 1, ¶¶ 1-2, & Audio Exh. 1 & 3.](#)



1 By way of further difference, in Plaintiffs’ song the singer tells her boyfriend  
2 that her friends do not like him and that they talk behind his back, but the singer  
3 assures him that despite what he may have heard from others, she trusts him and will  
4 stay true to him. In *Shake It Off*, however, the singer states to the world that she knows  
5 people have criticized her for supposedly staying out too late, not being smart, and  
6 going on too many dates, but she tells the world that she will “keep cruising” because  
7 she has “music in [her] mind” that tells her it will be alright. [Exh. 2 & 4](#).

8 The two songs’ alleged uses of players play and haters hate are very different.

9 **3. Conclusion**

10 The three-judge panel’s amended decision removed language critical of  
11 [Rule 12\(b\)\(6\)](#) dismissal of copyright claims and expressly invited the Court to  
12 consider on remand other grounds for dismissing Plaintiffs’ Complaint. [Hall v. Swift,](#)  
13 [786 F. App’x 711 \(9th Cir. 2019\)](#). One ground is that combining players play and  
14 haters hate is inseparable from the idea that Plaintiffs allege they intended to convey,  
15 namely players play and hater hate. Another ground is that combining players play  
16 and haters hate is not a protected selection and arrangement of numerous elements  
17 and, in addition, the two songs use the combination very differently. Each ground,  
18 preserved by the three-judge panel, supports dismissal of Plaintiffs’ infringement  
19 claim.

20  
21 Dated: August 11, 2020

Respectfully submitted,  

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