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13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 WESTERN DIVISION

16 NOEMI DEL RIO, an individual,
17 Plaintiff,
18 vs.
19 VIRGIN AMERICA, INC., a Delaware
20 Corporation; VIRGIN PRODUCED,
21 LLC, a Delaware Limited Liability
22 Company; and VIRGIN PRODUCED
23 2.0, LLC, a Delaware Limited Liability
24 Company,
25 Defendants.

Case No. 2:18-CV-01063-GW-SK

**DEFENDANTS' MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED (FRCP 12(b)(6))**

Hearing Date: May 21, 2018
Hearing Time: 8:30 a.m.
Hon. George H. Wu
Courtroom: 9D, 9th Floor

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION..... 4

II. PLAINTIFF’S ALLEGATIONS.....5

III. FED. R. CIV. P. 12(b)(6) STANDARDS.....6

IV. PLAINTIFF DOES NOT OWN A COPYRIGHTABLE INTEREST
IN THE RECORDING.....7

V. PLAINTIFF’S ALLEGED CONTRIBUTION IS NOT
COPYRIGHTABLE.....8

VI. EVEN IF PLAINTIFF’S ALLEGED CONTRIBUTION IS
COPYRIGHTABLE, HER COPYRIGHT CLAIM STILL
FAILS.....11

VII. CONCLUSION.....12

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TABLE OF AUTHORITIES

Cases:

1
2 *Casa Duse, LLC v. Merkin*, 791 F.3d 247 (2d Cir. 2015).....12
3
4 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).....6
5
6 *Batts v. Adams*, 2011 WL 13217923 (C.D. Cal. Feb. 8, 2011).....9
7
8 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).....6
9
10 *Butler v. Target Corp.*, 323 F. Supp. 2d 1052 (C.D. Cal. 2004).....9
11
12 *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).....4, 7
13
14 *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992 (9th Cir. 2010).....7
15
16 *Garcia v. Google*, 786 F.3d 733 (2015).....4, 5, 7, 8, 10
17
18 *Menalondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097 (9th Cir. 2008).....7
19
20 *Meribear Prods. Inc. v. Vail*, 2015 WL 12766576 (C.D. Cal. Aug. 11, 2015).....8
21
22 *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).....9
23
24 *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009).....6
25
26 *Newton v. Diamond*, 204 F. Supp. 2d 1244 (C.D. Cal. 2002).....10
27
28 *Rose v. Hewson*, 2018 WL 626350 (S.D.N.Y. Jan. 30, 2018).....9
Silas v. Home Box Office, Inc., 201 F. Supp. 3d 1158 (C.D. Cal. 2016).....9
Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992).....9
Zella v. E.W. Scripps Co., 529 F. Supp. 2d 1124 (C.D. Cal. 2007).....9

Statutes

17 U.S.C. § 101.....7, 11
17 U.S.C. § 505.....12

Rules

FRCP 12(b)(6).....6, 9

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1 I. INTRODUCTION

2 By this lawsuit, Plaintiff seeks sole ownership over a sound recording
3 used in defendant Virgin America’s airline safety video (the “Safety Video”),
4 despite the fact that her own allegations demonstrate she did not have any role
5 whatsoever in creating the allegedly infringed work – i.e., the recording (the
6 “Recording”). Plaintiff also makes the argument that she is the sole owner of
7 particular elements of a rap that she performed – specifically, the “voice,”
8 “rhythm,” and “melody” of the rap – even though she did not create the words
9 of the rap or the underlying music, and expressly acknowledges that she
10 created the rap “with Defendants.” Compl. ¶ 12 (emphasis added). These
11 arguments reflect a fundamental misunderstanding of copyright law and, more
12 importantly, were squarely rejected by the Ninth Circuit in *Garcia v. Google*,
13 786 F.3d 733 (2015). Plaintiff’s attempt to relitigate these issues should be
14 rejected.

15 First, absent particular exceptions that are not applicable here, the
16 copyright in a work initially belongs to the person “who actually creates the
17 work, that is, the person who translates an idea into a fixed, tangible
18 expression.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730,
19 737 (1989). Plaintiff does not allege that she created the Recording, directed
20 that the Recording be made, or that she otherwise had *any involvement*
21 *whatsoever* in making the Recording. Indeed, Plaintiff alleges the exact
22 opposite – that she was asked to come to a recording studio by others and
23 “step into a booth” to read lines of dialogue and perform the rap. Compl.
24 ¶¶ 11-12. Just as an actress does not own a copyright in the film that captured
25 her performance (as in *Garcia*), Plaintiff does not have any copyright interest
26 in the recording that captured her performance – let alone sole ownership of
27 such a recording.

28 ///

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1 Second, Plaintiff seems to claim that she owns particular elements of the
 2 rap that she performed in the recording booth, but it is black-letter law that
 3 performances are not copyrightable in and of themselves. Even if they were,
 4 the “voice, melody, and rhythm” of the rap in the Safety Video – independent
 5 from the words of the rap and the underlying music – are not copyrightable as
 6 a matter of law. And even assuming for the sake of the argument that these
 7 elements were copyrightable, the Ninth Circuit has specifically rejected
 8 “copyright cherry picking” – or, in other words, enabling contributors of
 9 specific elements to a work to claim copyright ownership over those elements
 10 separate and apart from the overall work. *Garcia*, 786 F.3d at 737.
 11 Expanding copyright law in this manner would make “Swiss cheese of
 12 copyrights.” *Id.* at 742. This is exactly what Plaintiff is attempting to do here.

13 Third, even if the Court determines that Plaintiff’s alleged contributions
 14 grant her some copyright interest in the Recording, she is clearly not the sole
 15 owner of the Recording. Indeed, Plaintiff expressly admits that Defendants
 16 “made various edits to the dialogue and offered advice and direction,” and that
 17 she created and recorded the rap “*with Defendants.*” Compl. ¶¶ 11, 12
 18 (emphasis added). Accordingly, *at most*, Plaintiff is a co-owner of the
 19 Recording and because co-owners cannot sue other co-owners for copyright
 20 infringement, her claims fail.

21 As more fully set forth in detail below, Defendants respectfully request
 22 that the Court dismiss Plaintiff’s Complaint in its entirety.

23 II. PLAINTIFF’S ALLEGATIONS

24 Plaintiff alleges that in September 2013, she was asked to come to a
 25 recording studio where she found “representatives from Defendants there as
 26 well as director John Chu.” Compl. ¶ 10. She alleges that “Defendants asked
 27 Ms. Del Rio to step into a booth and read about two pages of dialogue that
 28

1 included the Federal Aviation Administration regulations for airline safety.”¹
 2 She acknowledges that “[w]hile in the booth, Ms. Del Rio, Mr. [Todrick] Hall,
 3 Mr. Chu, and representatives of Defendants made various edits to the dialogue
 4 and offered advice and direction.” Compl. ¶ 11. She then alleges that
 5 somebody else “pitched the idea of a rap sung by a young child,” and that she
 6 then “spent the next few hours creating and recording this rap *with*
 7 *Defendants.*” Compl. ¶ 12 (emphasis added). Despite acknowledging that she
 8 created and recorded the rap with Defendants, Plaintiff then alleges that three
 9 specific elements of the rap were hers alone: the “voice,” “melody,” and
 10 “rhythm” of the rap. Compl. ¶ 13.²

11 Plaintiff alleges that she filed a copyright application “for the sound
 12 recording.” Compl. ¶ 20. Plaintiff now contends that Defendants infringed
 13 her purported copyright in the Recording.

14 **III. FED. R. CIV. P. 12(b)(6) STANDARDS**

15 To survive a Rule 12(b)(6) challenge, “the non-conclusory ‘factual
 16 content,’ and reasonable inferences from that content, must be plausibly
 17 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret*
 18 *Service*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S.
 19 662, 678 (2009)). “Determining whether a complaint states a plausible claim
 20 for relief ... [is] a context-specific task that requires the reviewing court to
 21 draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 678
 22 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). To state
 23 a plausible claim for relief, the complaint must allege sufficient facts to

24 _____
 25 ¹ Despite reading the FAA regulations for airline safety, Plaintiff disingenuously
 26 alleges that nobody informed her that “her vocals would be used commercially or on the
 27 actual in-flight safety video.” Compl. ¶ 16.

28 ² Defendants are assuming the truth of these allegations for purposes of this motion
 only. If Plaintiff’s claims survive this motion, Defendants will establish that Plaintiff
 played almost no role in the creation of the rap and no role whatsoever in the creation of the
 Recording. Defendants will also show that Plaintiff was fully aware that the rap was
 intended for, and used in, the Safety Video.

1 support a cognizable legal theory. *Menaliondo v. Centinela Hosp. Med. Ctr.*,
 2 521 F.3d 1097, 1104 (9th Cir. 2008).

3 While the Court must accept all of the well-pled factual allegations in
 4 the Complaint as true, the Court is not required to accept as true “allegations
 5 that contradict exhibits attached to the Complaint or matters properly subject
 6 to judicial notice, or allegations that are merely conclusory, unwarranted
 7 deductions of fact, or unreasonable inferences.” *Daniels-Hall v. Nat’l Educ.*
 8 *Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010).

9 **IV. PLAINTIFF DOES NOT OWN A COPYRIGHTABLE**
 10 **INTEREST IN THE RECORDING**

11 It is well established that a performance is not copyrightable in and of
 12 itself. *See, e.g.*, 1 Nimmer on Copyright § 1.08 (2017) (“[T]he performance of
 13 a play, musical composition, or other work cannot in and of itself be regarded
 14 as a writing capable of copyright protection.”). Rather, to obtain copyright
 15 protection, a work must be fixed in a tangible medium of expression “*by or*
 16 *under the authority of the author.*” 17 U.S.C. § 101 (emphasis added). *See*
 17 *also Reid*, 490 U.S. at 737 (explaining that “the author is the party who
 18 actually creates the work, that is, the person who translates an idea into a fixed,
 19 tangible expression entitled to copyright protection”). Because Plaintiff had
 20 no involvement whatsoever in creating the Recording – which is the allegedly
 21 infringed work (Compl. ¶ 20) – she does not own the Recording and cannot
 22 state a valid claim for copyright infringement of the Recording.

23 Importantly, the Ninth Circuit has already squarely addressed the
 24 situation in which a plaintiff alleges copyright infringement for the use of a
 25 performance that was recorded by the defendant. In *Garcia v. Google*, the
 26 plaintiff was an actress who was cast in a film supposedly titled “Desert
 27 Warrior,” but which ultimately became the controversial film “Innocence of
 28 Muslims.” *Garcia*, 786 F.3d at 737. After the plaintiff became aware that she

1 was being used in anti-Islam propaganda, she sued for copyright infringement,
 2 claiming that she owned a copyright interest in her performance. *Id.* The
 3 court rejected the argument, explaining, among other things, that the claim
 4 faced a “statutory barrier” because “[s]he never fixed her acting performance
 5 in a tangible medium.” *Id.* at 743. The court continued, “[f]or better or worse,
 6 [the writer-director] and his crew ‘fixed’ Garcia’s performance in the tangible
 7 medium, whether in physical film or in digital form. However one might
 8 characterize Garcia’s performance, she played no role in fixation.” *Id.* at 744.
 9 *See also Meribear Prods. Inc. v. Vail*, 2015 WL 12766576, at *3 (C.D. Cal.
 10 Aug. 11, 2015) (designer had no copyrightable interest in “home staging work
 11 that she performed” where a third party, not the designer, fixed the work in
 12 photographs) (emphasis omitted).

13 Here, Plaintiff does not allege that she had any involvement whatsoever
 14 in creating the Recording of her alleged performance. On the contrary,
 15 Plaintiff alleges that Defendants asked her to come to the recording studio, to
 16 step into a booth, and read two pages of dialogue and perform the rap. Compl.
 17 ¶¶ 10-12. As in *Garcia*, Plaintiff faces the insurmountable “statutory barrier”
 18 that she did not fix her performance in a tangible medium. Accordingly,
 19 Plaintiff’s claims fail as a matter of law and should be dismissed with
 20 prejudice.

21 **V. PLAINTIFF’S ALLEGED CONTRIBUTION IS NOT**
 22 **COPYRIGHTABLE**

23 Plaintiff alleges that she is the sole owner of particular elements of the
 24 alleged rap, namely the “voice,” “melody,” and “rhythm.” Compl. ¶ 13. As
 25 explained above, even if Plaintiff solely created these elements, she did not
 26 create the *Recording*, and thus her claims fail. To the extent the Court
 27 believes that copyrightable contributions confer copyright ownership of the
 28

1 Recording on Plaintiff, her claims would still fail because her alleged
2 contributions are not copyrightable as a matter of law.

3 **Melody.** Listening to the Safety Video demonstrates that the rap has no
4 melody.³ While the rapping does somewhat fluctuate in tone, it is no more
5 than typical speech and cannot reasonably be considered a “melody.”⁴
6 Plaintiff cannot claim a copyrightable interest in an element that simply does
7 not exist in the work at issue.

8 **Voice.** Plaintiff also cannot claim that performing the rap in a child’s voice
9 makes her performance protectable. Unlike lyrics or music, the mere tone of
10 an actor’s voice itself is not a copyrightable element. *See Butler v. Target*
11 *Corp.*, 323 F. Supp. 2d 1052, 1053 (C.D. Cal. 2004) (citing *Midler v. Ford*
12 *Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988), and *Waits v. Frito-Lay, Inc.*,
13 978 F.2d 1093, 1100 (9th Cir. 1992), for the proposition that “[t]he Ninth
14 Circuit has found that voice is not a subject matter of copyright”).

15 **Rhythm.** Plaintiff similarly cannot claim copyright protection for the
16 simple, repetitive rhythm of the rap. *See Rose v. Hewson*, 2018 WL 626350,
17 at *3 (S.D.N.Y. Jan. 30, 2018) (“Generally, individual notes and common
18 rhythms are not protectable.”); *Batts v. Adams*, 2011 WL 13217923, at *5
19 (C.D. Cal. Feb. 8, 2011) (the meter, tempo range, and rhythm of songs at issue
20 were some of many “common elements often present in popular music or prior
21 art, and, thus, must be filtered out” before comparing the works).

22
23 ³ The Safety Video is properly before this Court because its contents are alleged in the
24 complaint and form the basis of Plaintiff’s claim – indeed, Plaintiff specifically includes the
25 link to the Safety Video. *See Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1128 (C.D.
26 Cal. 2007) (considering episodes of television program referred to in complaint); *Silas v.*
27 *Home Box Office, Inc.*, 201 F. Supp. 3d 1158 (C.D. Cal. 2016) (explaining that “[w]hen
specific documents are referenced in a complaint, but not attached to the complaint, a
defendant may introduce those documents” on a Rule 12(b)(6) motion, and considering
episodes of defendants’ television series referred to in complaint).

28 ⁴ As one dictionary explains, rap “features rhythmic *speaking* set to a strong beat.”
Cambridge Advanced Learner’s Dictionary & Thesaurus (Cambridge University Press),
available at <https://dictionary.cambridge.org/us/dictionary/english/rap> (emphasis added).

1 Importantly, copyright protection extends only to those components of a
2 song that are original and nontrivial. *Newton v. Diamond*, 204 F. Supp. 2d
3 1244, 1253 (C.D. Cal. 2002) *aff'd* 349 F. 3d 591 (9th Cir. 2003). In *Newton*,
4 the court said, “[t]he protectability of elements of a copyrighted work is a
5 question of law for the court. Although the musical composition is protected
6 as a complete work, not every element of a song is per se protected.” *Id.* The
7 specific elements that Plaintiff claims that she owns are simply not protectable
8 as a matter of law.

9 Notably, in rejecting a similar theory to Plaintiff’s, the Ninth Circuit
10 explained in *Garcia v. Google* why copyright law does not recognize
11 ownership in cherry-picked elements of a work. The court warned that even if
12 some aspect of a plaintiff’s contribution would be copyrightable standing
13 alone, allowing individuals to claim ownership over particular elements of a
14 larger work would result in a “legal morass” that would “fragment copyright
15 protection” for unitary works “into many little pieces,” thus making “Swiss
16 cheese of copyrights.” *Garcia*, 786 F.3d at 742. The court further explained
17 that treating every contribution “as an independent work would not only be a
18 logistical and financial nightmare, it would turn cast of thousands into a new
19 mantra: copyright of thousands.” *Id.* at 743.

20 Just as the Plaintiff in *Garcia* did not have a copyright interest in her
21 acting performance, Plaintiff does not have a copyright interest in the “voice,
22 melody, and rhythm for the rap.” Complaint ¶ 13. If copyright law were
23 expanded to recognize sole ownership over particular contributions like those
24 that Plaintiff claims, every part of every work could be subject to numerous
25 separate copyright interests – potentially creating dozens or possibly even
26 hundreds of copyright interests in many works that benefit from creative input
27 from lots of individuals. The Ninth Circuit has already rejected expanding
28 copyright law in this manner.

1 **VI. EVEN IF PLAINTIFF’S ALLEGED CONTRIBUTION IS**
2 **COPYRIGHTABLE, HER COPYRIGHT CLAIM STILL**
3 **FAILS**

4 Even if this Court finds that Plaintiff has some copyright ownership of
5 the Recording, there is no colorable argument that Plaintiff is the *sole owner*
6 of any aspect of the Recording.

7 First, according to Plaintiff’s own allegations, her contributions were
8 made alongside “Mr. Hall, Mr. Chu, and representatives of Defendants,” who
9 “made various edits to the dialogue and offered advice and direction.”

10 Complaint ¶ 11. She then alleges that “*someone in the room pitched the idea*
11 *of a rap sung by a young child,*” after which “Ms. Del Rio spent the next few
12 hours *creating and recording this rap with Defendants.*” Complaint ¶ 12
13 (emphases added). Plaintiff cannot be the sole owner of any copyrightable
14 interest because her contributions were created, *by her own admission,* with
15 Defendants.

16 Second, even accepting Plaintiff’s allegations that she alone contributed
17 distinctive, original, and creative elements to the Recording (Compl. ¶ 15) and
18 that “her voice is a central part” of the Safety Video (Compl. ¶ 18), *and*
19 assuming those contributions were independently copyrightable – which they
20 are not – *and* conferred upon her some copyright interest in the Recording –
21 which they do not – *at most* she would be a joint author in the Recording. The
22 Copyright Act defines a joint work as “a work prepared by two or more
23 authors with the intention that their contributions be merged into inseparable
24 or interdependent parts of a unitary whole.” 17 U.S.C. § 101. Plaintiff only
25 alleges that she created the voice, melody, and rhythm of the rap – not the
26 words, and not the underlying music. Plaintiff cannot possibly argue that she
27 intended for those specific elements to constitute a standalone work that was
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1 not part of the overall rap – indeed, given that she did not create the words of
2 the rap, those elements literally cannot stand on their own.

3 Because at absolute best, Plaintiff is a co-author of the work, she cannot
4 sue other co-authors for infringement and her claims fail. *16 Casa Duse, LLC*
5 *v. Merkin*, 791 F.3d 247, 255 (2d Cir. 2015) (“[O]ne joint owner cannot be
6 liable for copyright infringement to another joint owner.”).

7 **VII. CONCLUSION**

8 For the foregoing reasons, Defendants respectfully request that the
9 Court dismiss Plaintiff’s Complaint with prejudice, and award Defendants
10 their costs and reasonable attorneys’ fees pursuant to 17 U.S.C. § 505, in an
11 amount to be determined by subsequent motion.

12
13 DATED: April 13, 2018

THE KERNAN LAW FIRM

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