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10 UNIVERSAL MUSIC GROUP, INC.

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

14 SEAN HALL, <i>etc., et al.</i> ,) Case No. 2:17-cv-06882 MWF (ASx)
15 Plaintiffs,)
16 vs.)
17 TAYLOR SWIFT, <i>etc., et al.</i> ,) DEFENDANTS' MEMORANDUM OF
18 Defendants.) POINTS AND AUTHORITIES IN
) SUPPORT OF MOTION FOR
) SUMMARY JUDGMENT
)
) Date: August 30, 2021
) Time: 10:00 a.m.

21 Courtroom of the Honorable
22 Michael W. Fitzgerald
23 United States District Judge
24
25
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27
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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

(a) Summary of Argument

The parties have completed expert disclosures and discovery as to the extrinsic test and Plaintiffs and their sole expert have admitted away Plaintiffs' claim that the song *Shake It Off* infringes the copyright in the song *Playas Gon' Play* ("*Playas*").

Plaintiffs admit that *Playas* and *Shake It Off* are very different in their music and also their lyrics – *Playas* is a love song in which “so-called friends” try to break up the singer and her romantic partner, while in *Shake It Off* the singer recounts that people criticize her but she shakes it off and finds comfort in music. Plaintiffs have narrowly limited their claim to their contention that *Shake It Off* copies *Playas*' use of the phrases “players gonna play” and “haters gonna hate” as the first two tautological phrases (“tautophrases”) in a series of four tautophrases that supposedly convey the idea that the world is full of untrustworthy people we should ignore.

However, Plaintiffs and their expert admit that “players gonna play” and “haters gonna hate” are public domain and that *Playas* and *Shake It Off* vary those unprotected phrases in different ways. They also admit that although *Shake It Off* includes a third and fourth tautophrase, they are different phrases than *Playas*' tautophrases. Also, *Playas* has an unbroken sequence of four, bare tautophrases, but *Shake It Off* follows its two variations of the preexisting “players gonna play” and “haters gonna hate” phrases with the lyrics, “Baby, I’m just gonna shake, shake, shake, shake, shake/Shake it off/Shake it off.” As a result of the undisputed facts, Plaintiffs' claim is merely that *Shake It Off* copies the unprotected idea of including four tautophrases in a chorus, with different public domain tautophrases used differently.

Applying this Circuit's extrinsic test confirms that *Shake It Off* and *Playas* are not substantially similar and, instead, are very different. As a result, Plaintiffs' claim fails both because the songs are not substantially similar in protected expression and also because they lack substantial similarities probative of copying.

1 **(b) Summary of Uncontroverted Facts**

2 The following facts, most of which are taken from Plaintiffs' pleading, their
3 discovery responses, and their expert's deposition testimony, are assumed true for the
4 purposes of this Motion.

5 **(1) The Prevalence of Player and Hater Phrases Prior to 2001**

6 Before 2001, player and hater phrases, often with the African American
7 Vernacular English ("AAVE") pronunciations "playa" and "hata," were widely used,
8 including in popular music. Facts 5-7, 28.¹ The variations of player and hater phrases
9 predating 2001 are numerous (*see* Facts 1-4, 8-27) and include the public domain
10 phrases "players gonna play" and "haters gonna hate," which had become part of the
11 urban vocabulary (Facts 13, 21, 29-30).

12 **(2) Plaintiffs' 2001 Preparation of the Musical Composition**

13 ***Playas with Already-Existing Player and Hater Phrases***

14 Plaintiffs co-authored the musical composition *Playas* in 2001 and sound
15 recordings of the performance of that musical composition by the musical group,
16 3LW, were released to the public in May 2001. Facts 31-32. *Playas* is a romantic
17 love song in which the singer tells her boyfriend that, despite "so-called friends" trying
18 to break them up, she will stay true to him and he can trust her, as she trusts him. Fact
19 33.² *Playas* slightly varies the player and hater phrases that appear in prior art by
20 adding "they" and, in one instance, abbreviating "gonna" to "gon": "Players, they
21 gon' play" and "Haters, they gonna hate." These variations are trivial and Plaintiffs
22 do not claim copyright in them. Facts 94-95, 100-101.

24 ¹ References to Facts are to uncontroverted facts in Defendants' accompanying
25 proposed Statement of Uncontroverted Facts and Conclusions of Law.

26 ² *Playas'* lyrics do not identify the genders of the singer and the singer's romantic
27 partner. For convenience and consistent with the parties' respective expert reports, it
28 is assumed the singer is female and her romantic partner is male. Likewise, it is
assumed that the singer in *Shake It Off* is female.

**(3) By 2014, Player and Hater Phrases Had Become Ubiquitous
in Popular Culture**

By 2014, player and hater phrases, including with AAVE pronunciations “playa” and “hata,” had become ubiquitous throughout popular culture, including music (Facts 245-55), television (Facts 256-79), movies (Facts 280-86), articles (Facts 287-96), books (Facts 297-98), and even clothing – a t-shirt with the words “Haters Gonna Hate” was worn by Ms. Swift at the 2013 Billboard Awards (Fact 299).

**(4) The August 2014 Release of *Shake It Off* with New Variations
on Player and Hater Phrases**

In 2014, the musical composition *Shake It Off* was created and recordings of it were released to the public. Fact 34. In *Shake It Off*, the singer recounts that people say she stays out too late, has nothing in her brain, and goes on too many dates, but she shakes off that criticism and finds comfort in music. Fact 35. Rather than a romantic love song like *Playas*, *Shake It Off* is a song about individual freedom and the singer’s independence from her critics. Facts 33, 187. *Shake It Off* also varies the public domain phrases, “players gonna play” and “haters gonna hate,” by repeating the stressed verbs “play” and “hate” to create the new and unique lyrics, “‘Cause the players gonna play, play, play, play, play,” and “the haters gonna hate, hate, hate, hate, hate.” Facts 119-22. This rhythmic repetition provides *Shake It Off* a dynamism, mood, and pace absent in *Playas*. Prof. Lewis Decl., Exh. 5 at 14-15, 19-20, 30-31.

(5) Plaintiffs’ Filing of this Action for Copyright Infringement

Plaintiffs’ Complaint alleges a single claim for copyright infringement. Fact 36. Plaintiffs allege that their decision to combine a players-gonna-play phrase with a haters-gonna-hate phrase in a sequence of four tautophrases underlined below on the left in *Playas*, is copied in the underlined portion of *Shake It Off*’s lyrics on the right:

Playas

Playas, they gon’ play

And haters, they gonna hate

Shake It Off

’Cause the players gonna play,

play, play, play, play

1 Ballers, they gon' ball

And the haters gonna hate, hate,

2 Shot callers, they gonna call

hate, hate, hate

3 That ain't got nothing to do

Baby, I'm just gonna shake,

4 With me and you

shake, shake, shake, shake

5 That's the way it is

Shake it off

6 That's the way it is

Shake it off

7 Heartbreakers gonna break,

8 break, break, break, break

9 And the fakers gonna fake, fake,

10 fake, fake, fake

11 Baby, I'm just gonna shake,

12 shake, shake, shake, shake

13 Shake it off

14 Shake it off

15 Anderson Decl. at 2, ¶¶ 8-9, Exh. 13, 14; Facts 70-75.

16 The Court granted Defendants' Motion to Dismiss but that ruling was reversed
17 on appeal. In reversing, the Court of Appeals ruled only that, as to an allegedly copied
18 "six-word phrase and a four-part lyrical sequence," Plaintiffs had "plausibly alleged
19 originality." *Hall v. Swift*, 786 F. App'x 711, 712 (9th Cir. 2019). The Court of
20 Appeals did not reach other issues, including whether Plaintiffs plausibly pleaded
21 substantial similarity between *Playas* and *Shake It Off*. *Id.* at 712 n.1.

22 On remand, this Court entered its Order ([Doc. 87](#)) on the parties' Stipulation
23 ([Doc. 86](#)), setting a separate schedule of expert disclosures and discovery as to the
24 extrinsic test, with an eye to Defendants bringing an early summary judgment motion.

25 Defendants identified three experts. Defendants' musicologist, Dr. Ferrara, is
26 a Full Professor of Music and the Director Emeritus of all studies in Music and the
27 Performing Arts in New York University's Steinhardt School. Dr. Ferrara Decl. at 1,
28 ¶ 2. Defendants' linguistics expert, Prof. Marcyliena Morgan, is a Professor in

Harvard University's Department of African and African American Studies and the Director of Harvard's Hip-hop Archive and Research Institute. Prof. Morgan Decl. at 1, ¶ 2. Defendants' literary expert, Prof. Nathaniel Lewis, is a Professor of English at Saint Michael's College, Vermont, and past Chair of the Department and Director of the American Studies Program. Prof. Lewis Decl. at 1, ¶ 2.

Plaintiffs designated only Prof. Loren Kajikawa, an Associate Professor of Music in the Corcoran School of Arts & Design at George Washington University. Anderson Decl. at 1-2, ¶¶ 4, 6, Exh. 7 (Prof. Kajikawa initial Report) at 1. The focus of his studies is race and politics. Fact 137.³

2. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED

(a) The Standards Applicable to this Motion

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting *Fed. R. Civ. P. 1*). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. Once the movant shows that summary judgment is appropriate, the burden shifts to the nonmoving party to establish genuine issues exist as to material facts. *Celotex*, 477 U.S. at 324. "The 'party opposing summary judgment must direct [the court's] attention to specific, triable facts'" (*Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1058 (9th Cir. 2009) (quoting *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003))) and "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

³ Defendants reserve the right to challenge Dr. Kajikawa's qualifications.

(b) **Playas and Shake It Off Are Not Substantially Similar in Protected Expression**

(1) **The Extrinsic Test to Determine Whether Works Are Substantially Similar in Protected Expression**

To defeat summary judgment, the plaintiff in a copyright case must not only present proof that the defendant copied the plaintiff's work but also that the copying constitutes "unlawful appropriation." Skidmore v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020) (quoting Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018)), *overruled on other grounds by* Skidmore, 952 F.3d 1051. "To prove unlawful appropriation, ... the similarities between the two works must be 'substantial' and they must involve protected elements of the plaintiff's work." Rentmeester, 883 F.3d at 1117. "[A] two-part analysis – an extrinsic test and an intrinsic test – is applied." Rice, 330 F.3d at 1174. Because both tests must be satisfied, "a plaintiff who cannot satisfy the extrinsic test necessarily loses on summary judgment." Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994).

"[T]he extrinsic test [] compares the objective similarities of specific expressive elements in the two works." Skidmore, 952 F.3d at 1064. "The extrinsic test requires 'analytical dissection of a work and expert testimony.'" Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004) (quoting Three Boys Music v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000), *overruled on other grounds by* Skidmore, 952 F.3d 1051). "'Analytical dissection' requires breaking the works 'down into their constituent elements, and comparing those elements for proof of copying as measured by 'substantial similarity.'" Swirsky, 376 F.3d at 845 (quoting Rice v. Fox Broad. Co., 148 F. Supp. 2d 1029, 1051 (C.D. Cal. 2001), *rev'd on other grounds*, 330 F.3d 1170 (9th Cir. 2003)).

"Crucially, because only substantial similarity in protectable expression may constitute actionable copying that results in infringement liability, 'it is essential to distinguish between the protected and unprotected material in a plaintiff's work.'"

1 Skidmore, 952 F.3d at 1064 (quoting Swirsky, 376 F.3d at 845). “A court ‘must take
2 care to inquire only whether “the *protectible elements, standing alone*, are
3 substantially similar”’ [and] filter out and disregard the non-protectible elements.”
4 Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002) (quoting Williams
5 v. Crichton, 84 F.3d 581, 588 (2d Cir. 1996)).

6 “[E]xpressions that are standard, stock, or common to a particular subject
7 matter or medium are not protectable under copyright law.” Skidmore, 952 F.3d at
8 1069 (quoting Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003)); Smith v. Jackson,
9 84 F.3d 1213, 1219 (9th Cir. 1996). Also, “[c]opyright law only protects expression
10 of ideas, not the ideas themselves.” Cavalier, 297 F.3d at 823; 17 U.S.C. § 102(b)
11 (“In no case does copyright protection ... extend to any idea [or] concept ... regardless
12 of the form in which it is ... embodied in [a] work”). Instead, “the extrinsic test
13 requires that the plaintiff identify concrete elements based on objective criteria.”
14 Three Boys Music, 212 F.3d at 485. Accordingly, similarities at a “general, abstract
15 level” are not sufficient. Funky Films, Inc. v. Time Warner Entm’t Co., 462 F.3d 1072,
16 1076, 1081 (9th Cir. 2006), *overruled on other grounds by* Skidmore, 952 F.3d 1051.

17 In addition, the extrinsic test is not satisfied if “the two works reveal[] greater,
18 more significant differences and few real similarities.” Funky Films, 462 F.3d at
19 1078; *see, also* Benay v. Warner Bros. Ent., 607 F.3d 620, 625 (9th Cir. 2010) (same),
20 *overruled on other grounds by* Skidmore, 952 F.3d 1051.

21 In summary, the Court, with the aid of expert testimony, “appl[ies] the objective
22 factors of the extrinsic test, considering only the protectible material, to determine
23 whether [the defendant’s work], taken as a whole, [is] sufficiently similar to [the
24 plaintiff’s work] to raise a triable issue of fact.” Cavalier, 297 F.3d at 824.

25 (2) Applying the Extrinsic Test to *Playas* and *Shake It Off* as 26 Musical Works with Lyrics

27 Plaintiffs claim similarity between their musical work, *Playas*, and another
28 musical work, *Shake It Off*. That these songs are musical works is not changed by the

fact each includes lyrics. 17 U.S.C. § 102(a)(2) (copyright subsists in original “musical works, including any accompanying words”); 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2.05[C] (2021) (“[T]he mere fact that words are in a form adaptable to be set to music does not render them a ‘musical work’ unless, in fact, those words have been integrated with music.”).

Plaintiffs contend that because they only claim similarity in lyrics, the music of the two songs is irrelevant. But the way in which lyrics are set to music is an important aspect of a musicological analysis of two musical compositions. *See, e.g., Williams v. Gaye*, 895 F.3d 1106, 1118-19, 1150 n.10 (9th Cir. 2018) (judgment on jury verdict affirmed where claimed similarities include “word painting” in which the music illustrates words in the lyrics, *e.g.*, “setting the lyric ‘higher’ to an ascending melody”); *Three Boys Music*, 212 F.3d at 485 (judgment on jury verdict affirmed where claimed similarities included hook phrase’s “lyrics, rhythm, and pitch”). To dismiss as irrelevant the very different relationship of the lyrics to the music in *Playas* and *Shake It Off* is to sidestep an important consideration under the extrinsic test, namely whether “the two works reveal[] greater, more significant differences and few real similarities.” *Funky Films*, 462 F.3d at 1078. Accordingly, it is appropriate to analyze *Playas* and *Shake It Off* as musical works with lyrics.

The principal elements considered in the analysis of two musical works are (1) structure; (2) harmony; (3) rhythm; and (4) melody; and when present, (5) lyrics. Fact 37. Applying the extrinsic test to *Playas* and *Shake It Off* confirms they are not substantially similar in protected expression and, instead, they are very different.

(i) Structure

The “structure” of a musical composition is the organization of musical units or groups, such as verses and choruses. Fact 42. Defendants’ musicologist, Dr. Lawrence Ferrara, showed that both *Playas* and *Shake It Off* include generic structural building blocks of introductions, verses, bridges, and choruses, and that each song contains other structural units not included in the other song. Facts 43-45. Dr. Ferrara

1 concluded that there are no significant structural similarities between the two songs,
2 but that there are significant structural differences. Facts 46-47.

3 Plaintiff's expert, Prof. Kajikawa, did not conduct an analysis of any of the
4 music in *Playas* and *Shake It Off*. In his Rebuttal Report directed to Dr. Ferrara's
5 initial Report, he asserted that the songs' structures are irrelevant because Plaintiffs
6 limit their claim to the songs' lyrics. Anderson Decl. at 1, ¶ 4(b), Exh. 8 (Kajikawa
7 Rebuttal Report *re* Ferrara initial Report) at 2, ¶ 3. In his deposition, however, he
8 testified that he agrees with Dr. Ferrara's conclusion that there are no significant
9 structural similarities between the two songs. *See* Fact 47 evidence.

10 (ii) Harmony

11 "Harmony" refers to the tonal relationship of pitches that sound simultaneously,
12 especially with respect to the use and organization of "chords," a sequence of which
13 is referred to as a chord progression, with the rate of change of chords referred to as
14 harmonic rhythm. Fact 48. Dr. Ferrara explained that *Playas* and *Shake It Off* are in
15 different keys and modalities, with *Playas* in the key of C-sharp minor and *Shake It*
16 *Off* in the key of G major. Facts 49-51. He also showed that, transposing both musical
17 compositions to the same key for comparison purposes, the chords, chord
18 progressions, and harmonic rhythm of *Playas* and *Shake It Off* are not significantly
19 similar and, quite the contrary, are completely different. Facts 49-55.

20 Prof. Kajikawa deemed harmony irrelevant in his Rebuttal Report directed to
21 Dr. Ferrara's initial Report (Exh. 8 at 2, ¶ 4), but testified he agrees that there are no
22 significant similarities in harmony in the two songs. *See* Fact 55 evidence.

23 (iii) Rhythm

24 "Rhythm" in music refers to the pattern and organization of the time values of
25 sounds and silences and the overall rhythmic flow and feel in musical time. Fact 56.
26 Dr. Ferrara showed that both *Playas* and *Shake It Off* are in 4/4 meter, referred to as
27 "common time," which is commonplace in music. Fact 57. He also showed that the
28 two songs' tempos are very different, with *Playas* 93 beats per minute and *Shake It*

1 *Off* much faster at 160 beats per minute, the rhythms in the songs’ instrumental and
2 vocal parts are very different, and there are no significant similarities. Facts 58-62.

3 Prof. Kajikawa deemed rhythm irrelevant in his Rebuttal Report directed to Dr.
4 Ferrara’s initial Report (Exh. 8 at 2, ¶ 5), but testified that he agrees there are no
5 significant similarities in rhythm in the two songs. *See* Fact 62 evidence.

6 (iv) Melody

7 “Melody” is a single line of music consisting primarily of a sequence of
8 pitches – that is, the specific high or low placement of musical sounds – and the
9 rhythmic durations of those pitches within a melodic phrase structure. Fact 63. Dr.
10 Ferrara explained that because *Playas* and *Shake It Off* are in different modes – minor
11 and major – there are two principal ways of transposing them for comparison
12 purposes, namely to the same key signature or to the same pitch center. He showed
13 that using either way, there are no significant melodic similarities and, instead, the
14 melodies of the two songs are very different. Facts 64-68.

15 Prof. Kajikawa deemed melody irrelevant in his Rebuttal Report directed to Dr.
16 Ferrara’s initial Report (Exh. 8 at 2, ¶ 6), but testified that he agreed there are no
17 significant similarities in melody in the two songs. *See* Fact 68 evidence.

18 (v) Lyrics

19 Lyrics are the words sung or spoken in a song. Fact 69. Dr. Ferrara showed,
20 and Prof. Kajikawa agrees, that the words spoken by the singers in *Shake It Off*’s
21 introduction, two verses, two pre-choruses, interlude, bridge, and post-chorus bear no
22 significant similarity to any lyrics in *Playas*. Fact 75. That leaves only the lyrics in
23 the two songs’ choruses and, applying the extrinsic test, “it is essential to distinguish
24 between the protected and unprotected material in a plaintiff’s work.” [*Skidmore*, 952](#)
25 [F.3d at 1064](#) (quoting [*Swirsky*, 376 F.3d at 845](#)).

26 Both songs’ choruses include variations on the phrases “players gonna play”
27 and “haters gonna hate.” Plaintiffs agree that those two phrases, as well as Plaintiffs’
28 variations, “Players, they gon’ play” and “haters, they gonna hate,” are in the public

1 domain. Facts 92-102. As a result, Plaintiffs' player and hater phrases are
 2 "unprotected material in [Plaintiffs'] work." Skidmore, 952 F.3d at 1064 (quoting
 3 Swirsky, 376 F.3d at 845).

4 In addition, all parties agree that the other lyrics in *Playas*' chorus do not appear
 5 in *Shake It Off*. Facts 71-73. Instead, Plaintiffs argue that *Shake It Off*, like *Playas*,
 6 includes a third and fourth tautophrase. However, those third and fourth tautophrases
 7 are very different: "Ballers, they gonna ball" and "Shot callers, they gonna call" in
 8 *Playas*, but "Heartbreakers gonna break, break, break, break, break" and "Fakers
 9 gonna fake, fake, fake, fake, fake" in *Shake It Off*. Facts 123-28. Also, *Playas*' four
 10 tautophrases are in an unbroken sequence while *Shake It Off* has two sets of two
 11 tautophrases each, separated by three lines of lyrics that do not appear in *Playas*.
 12 Facts 129-33. As a result, the only similarity is the idea of multiple tautophrases and
 13 that idea also is "unprotected material in [Plaintiffs'] work." Skidmore, 952 F.3d at
 14 1064 (quoting Swirsky, 376 F.3d at 845); 17 U.S.C. § 102(b) (ideas not protected).

15 Finally, there are great differences in the lyrics of *Playas* and *Shake It Off*.
 16 "[T]aken as a whole" (Cavalier, 297 F.3d at 824), *Playas* is a love song in which the
 17 singer tells her boyfriend that she will stay true to him despite attempts by "so-called
 18 friends" to break them up. Fact 33. In stark contrast, *Shake It Off* is a song about
 19 personal independence in which the singer shakes off criticism of her and finds
 20 comfort in music. Fact 35, 187, 212. All the lyrics in all of the songs' parts are
 21 different except only the choruses, where the unprotected public domain player and
 22 hater phrases, as well as the idea of multiple tautophrases, are used differently with
 23 different lyrics. Facts 70-82, 117-33. Those lyrics also are set to very different music.
 24 Facts 48-68.

25 The lack of similarity in protected expression and the many differences
 26 preclude a finding of substantial similarity under the extrinsic test. See, e.g., Benay,
 27 607 F.3d at 625 (summary judgment affirmed where "many more differences than
 28 similarities" and "[t]he most important similarities involve unprotectable elements");

Cavalier, 297 F.3d at 828 (no substantial similarity where unprotected elements “are arranged and formatted differently”); Morrill v. Stefani, 338 F. Supp. 3d 1051, 1060-61 (C.D. Cal. 2018) (summary judgment granted where musical compositions used unprotected elements “in different manners”).

(vi) As Musical Works with Lyrics, the Works Are Not Substantially Similar in Protected Expression

Plaintiffs and their expert agree that *Playas* and *Shake It Off* are not substantially similar in structure, harmony, rhythm, and melody, and that the claimed lyric similarity is confined to the songs’ choruses where Plaintiffs’ variation on the public domain player and hater phrases and the idea of multiple tautophrases are unprotected and different from *Shake It Off*. “[C]onsidering only the protectible material, [*Shake It Off*], taken as a whole, [is not] sufficiently similar to [*Playas*] to raise a triable issue of fact.” Cavalier, 297 F.3d at 824.

(3) Applying the Extrinsic Test to the Lyrics of *Playas* and *Shake It Off* as Literary Works

Plaintiffs concede that *Playas*’ lyrics were not a pre-existing poem or literary work that was subsequently set to music but, instead, were “written as part of [the] musical composition” See Pltfs’ Opening Brief on appeal (9th Cir. Dkt. Entry 17) at 8. But Plaintiffs also have described their claim as “involv[ing] a literary work used in a musical composition” Id. at 29. However, analyzing the lyrics of *Playas* and *Shake It Off* as literary works ignores the extreme differences in the music to which the lyrics are set. The music, and those differences, are properly considered. But Plaintiffs fare no better under this Circuit’s extrinsic test as to literary works.

As applied to literary works, “[t]he extrinsic test is an objective test based on specific expressive elements: the test focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works.” Benay, 607 F.3d at 624 (quoting Kouf, 16 F.3d at 1045). As with the extrinsic test generally, the “court must take care to inquire only whether the protect[able]

elements, standing alone, are substantially similar.” Benay, 607 F.3d at 624 (alteration in original) (quoting Cavalier, 297 F.3d at 822).

Review of the two songs’ respective lyrics under the extrinsic test as applied to literary works confirms they are not substantially similar in protected expression.

(i) Plot

Plot is the pattern of events and situations in a narrative or dramatic work, as selected and arranged both to emphasize relationships – usually of cause and effect – between incidents and to elicit a particular kind of interest in the reader or audience. Fact 142.

Defendants’ literary expert, Prof. Lewis, explained that some song lyrics are fully narrative, setting out complex plots – for example, Bob Dylan’s song “Hurricane” recounts the story of Ruben “Hurricane” Carter. Prof. Lewis Decl. at 3, ¶ 11. Other song lyrics are less so and, here, the plots of *Playas* and *Shake It Off* are in the singer’s declarations:

- In *Playas*, the singer professes her undying love for her partner. Although her friends disapprove of their relationship (“don’t wanna see me with you”) and try to separate them (“behind your back, callin’ my cell and pager too”), she insists that she “will stay true” to him.
- In *Shake It Off*, the singer declares her need to “shake off” the criticisms of her. Instead of giving in, she is going to “keep cruising,” dancing to “the music in [her] mind.”

Facts 143-44. The plots of the two songs are glaringly different. Facts 145-46.

Prof. Kajikawa is not a literary expert and his initial Report did not consider the plots of the lyrics. Facts 137-140; Anderson Decl., Exh. 7 (Prof. Kajikawa initial Report). In his Rebuttal Report directed to Prof. Lewis’ initial Report, Prof. Kajikawa – after acknowledging that Prof. Lewis relies on “literal events” in the songs’ respective lyrics – argued the singers’ “feelings” are “similar” because “people are threatening us, but we need to ignore them and hold true to what we believe.”

Anderson Decl., Exh. 10 (Kajikawa Rebuttal Report *re* Prof. Lewis initial Report) at 3-4, ¶¶ 12-13.

However, “the extrinsic test requires that the plaintiff identify concrete elements based on objective criteria.” Three Boys Music, 212 F.3d at 485. While Prof. Lewis relies on the actual words in the lyrics, Prof. Kajikawa ignores them to instead posit a similarity – people who threaten us should be ignored – at a general or abstract level. In doing so, Prof. Kajikawa violates the extrinsic test by relying on generalizations rather than concrete elements. *See, e.g., Kouf, 16 F.3d at 1045-46* (“We attach no significance to the fact that both works involve a life struggle of kids fighting insurmountable dangers, because ‘[g]eneral plot ideas are not protected by copyright law’”) (quoting Berkic v. Crichton, 761 F.2d 1289, 1292 (9th Cir. 1985)); Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984) (“Any similarities in plot exist only at the general level for which plaintiff cannot claim copyright protection.”). In addition, Prof. Kajikawa’s assertion that both songs share the general idea that “people are threatening us, but we need to ignore them and hold true to what we believe” is divorced from the actual lyrics. For example, *Shake It Off*’s lyrics refer to people criticizing the singer, and criticizing someone is not threatening them. An apt generalization of a shared idea might be “ignore what people say,” and this only highlights there is no substantial similarity in protected expression in plot.

(ii) Sequence of Events

The sequence of events in a literary work is the order in which events appear in the narrative. Fact 147. The events in *Playas* are: (1) the singer reassures her partner that, despite what their so-called friends are saying, she cares only about what her partner “believe[s] is true”; (2) their friends are trying to break them up but, “no matter what they do,” she will remain true; and (3) the singer expresses an ongoing commitment to remain true to her partner and declares that their love “will be forever.” Fact 148. In contrast, the events in *Shake It Off* are: (1) the singer recognizes that “people say” she stays out too late, is not especially intelligent (“got nothing in my brain”),

1 and goes on too many “dates”; (2) the singer remarks that people “don’t see” that she
 2 will persevere (through dancing and music); and (3) the singer describes a situation
 3 with her “ex-man” and his “new girlfriend” and a “fella” whom she imagines inviting
 4 to “shake.” Fact 149. The sequences of events are very different. Facts 152-53.

5 Prof. Kajikawa’s initial Report did not consider the sequence of events in the
 6 lyrics of *Playas* and *Shake It Off*. Exh. 7 (Prof. Kajikawa initial Report). In his
 7 Rebuttal Report directed to Prof. Lewis’ initial Report, Prof. Kajikawa argues that the
 8 first verse of *Playas* does not mention “so-called friends,” which instead appears in
 9 the second verse. Exh. 10 (Prof. Kajikawa Rebuttal Report *re* Prof. Lewis initial
 10 Report) at 4, ¶ 14. However, *Playas*’ first verse, which begins “I, I don’t mind,” does
 11 not describe an event; instead, it is the singer telling her boyfriend she does not mind
 12 what people say he does. Exh. 13.⁴ Moreover, even if that were considered an event
 13 it would not help Plaintiffs because nowhere in *Shake It Off* does the singer say she
 14 does not mind what people say her boyfriend does. Facts 150-51.

15 Prof. Kajikawa also argues that Prof. Lewis’ statement of the sequence of events
 16 in *Playas* and *Shake It Off* omits the songs’ respective choruses. Exh. 10 at 4, ¶ 15.
 17 However, the choruses also do not describe an event. *See* Exh. 13 & 14; Prof. Lewis
 18 Decl. at 11, ¶ 39. Prof. Kajikawa next argues that considering the sequence of events
 19 is not “useful or relevant.” Exh. 10 at 4-5, ¶¶ 16-17. But the extrinsic test includes
 20 whether there are “articulable similarities between the ... sequence of events in two
 21 [literary] works.” [Benay, 607 F.3d at 624](#) (quoting [Kouf, 16 F.3d at 1045](#)).

22
 23 ⁴ Citing unofficial Internet postings of *Playas*’ lyrics, Prof. Kajikawa claims the
 24 *Playas* lyric might be either “What people say or do” or “What people say and do.”
 25 Even if true, it still is not an event. Further, the *Playas* lyrics he produced in response
 26 to Defendants’ Subpoena state “What people say you do.” Exh. 13. Also, copyright
 27 was registered in the *Playas* musical composition by depositing with the Copyright
 28 Office the 3LW recording as a “complete” copy of the musical composition. [17 U.S.C. § 408\(b\)\(2\)](#). Listening to the 3LW recording confirms the lyric is “What
 people say you do.” Anderson Decl. at 1, ¶ 5(a), Audio Exh. 1 at track 1 at 0:28-0:32.

1 Finally, Prof. Kajikawa argues that Prof. Lewis' reference to Dr. Ferrara's
 2 initial Report "is misleading" because Dr. Ferrara's initial Report refers to
 3 Prof. Lewis' Report. Exh. 10 at 18. However, the references are to different subjects:
 4 Prof. Lewis' initial Report refers to Dr. Ferrara's identification of the songs' different
 5 structures (Exh. 5 at 9-10), while Dr. Ferrara's initial report refers to Prof. Lewis' and
 6 Prof. Morgan's analyses of the songs' respective lyrics (Exh. 1 at 1, ¶ 3).

7 Prof. Kajikawa fails to raise a genuine dispute and the sequence of events in
 8 *Playas* and *Shake It Off* are not substantially similar but, instead, are very different.

9 (iii) Characters

10 The characters in *Playas* include the singer, who is in a romantic relationship
 11 threatened by "so-called friends" and who strives to maintain that romantic relation-
 12 ship by assuring her boyfriend that she trusts him and he should trust her. Facts 154,
 13 156-58. There is no character with those attributes in *Shake It Off*. Instead, the singer
 14 in *Shake It Off* acknowledges "people say" she stays out too late, is not smart, and
 15 goes on too many dates, but she will "keep cruising" with "music in my mind." She
 16 is independent, confident, determined, and defined by her independence and love of
 17 music. Fact 159. There is nothing to indicate she is in a romantic relationship, let
 18 alone a threatened one. Facts 160-61. Nor does the singer in *Playas* find comfort in
 19 music. Facts 162-63. They are very different characters. Facts 164-65.

20 The characters in *Playas* also include the singer's boyfriend. As the person the
 21 singer addresses and strives to reassure in the face of attempts to interfere with their
 22 relationship, the singer's boyfriend is central to *Playas*. Facts 166-67. A boyfriend
 23 with whom the singer has a threatened romantic relationship is "[c]ompletely missing
 24 from" *Shake It Off*. [Funky Films, 462 F.3d at 1079](#) (noting absence in one work of a
 25 "central character" whose "romantic attachments and relationships form an important
 26 part of [other work's] plot-line"). Facts 168-69.

27 *Playas*' lyrics also refer to the singer's "so-called friends" who do not want to
 28 see the singer with her boyfriend and, behind his back, are calling and paging the

1 singer. Fact 170. There is no reference in *Shake It Off*'s lyrics to someone who is
 2 trying to break up the singer's romantic relationship. Facts 171-72. Also, *Shake It*
 3 *Off*'s lyrics refer to "people" who say she stays up too late, is not smart, and goes on
 4 too many dates. Fact 173. *Playas*' lyrics do not refer to anyone who criticizes the
 5 speaker. Facts 174-77. Prof. Kajikawa strains to find similarity by arguing that in
 6 both songs someone poses an "existential threat" (Exh. 10 at 3, ¶ 7), namely, in *Playas*
 7 a threat to the singer's romantic relationship (Fact 87), and in *Shake It Off* a threat to
 8 the singer's "self-confidence" (Fact 88). But he agrees this is not a substantial
 9 similarity. Facts 89-90; *see also Funky Films, 462 F.3d at 1078* ("“prodigal son”
 10 characters” similar “at the abstract level” but actually “markedly different”).

11 Finally, also completely absent from *Playas* are the characters that *Shake It Off*
 12 identifies as the singer's "ex-man," his "new girlfriend," and a "fella" seen from a
 13 distance, with whom the singer contemplates dancing. Facts 178-184. That these
 14 characters "have no counterpart" in *Playas* also supports the lack of substantial
 15 similarity under the extrinsic test. *Funky Films, 462 F.3d at 1079*.

16 (iv) Theme

17 The central theme of *Playas* established by its lyrics is the endurance of love in
 18 the face of social adversity, while the central theme of *Shake It Off* is the singer's
 19 independence from those who criticize her. Facts 186-87. Plaintiffs' expert,
 20 Prof. Kajikawa, agrees but observes "it is possible to accurately describe each song as
 21 having the same basic theme, such as 'maintaining healthy relationships in the face of
 22 social adversity.'" Exh. 10 at 5, ¶¶ 19-20. His "possible" generalization glosses over
 23 the stark differences between the themes established by the actual lyrics. *Funky Films,*
 24 *462 F.3d at 1079* (claimed generalized themes not substantially similar because works
 25 "explore [their themes] in very different ways").

26 (v) Setting

27 Setting is the general locale, historical time, and social circumstances in which
 28 the action occurs, the "when" and "where." Fact 190. References in *Playas* to a cell

1 phone and pager and both songs' use of player and hater phrases suggest the songs are
 2 each set in recent times, which is commonplace. Facts 191-93. However, *Shake It*
 3 *Off*'s lyrics also describe events at a social gathering or nightclub, where the singer's
 4 "ex-man brought his new girlfriend" and there is a "fella" with good hair. Fact 194.
 5 There is no counterpart in *Playas* to that setting in *Shake It Off*. Facts 195-98.

6 (vi) Mood

7 Mood, also called "atmosphere," is the "emotional tone pervading a section or
 8 the whole of a literary work." Fact 199. *Playas*' lyrics establish a soulful and intimate
 9 mood, while *Shake It Off*'s lyrics establish a defiant, confident, joyful, and playful
 10 mood. Facts 200-03. Plaintiffs' expert agrees, although he does not believe the lyrics'
 11 different moods are relevant. See Facts 200-01 evidence.

12 (vii) Pace

13 In works of fiction and narrative poetry, pace is generally the speed at which
 14 the plot and sequence of events unfold, while in non-narrative poetry and lyrics, pace
 15 is the tempo at which the verse unfolds. Fact 204. Here, pace refers to the rhythms
 16 established by the arrangement or pattern of stressed and unstressed syllables, syntax,
 17 punctuation, rhyme, repetition, and word choice. Prof. Lewis Decl. at 6, ¶ 24.

18 *Playas*' lyrics use lines relatively even in length, largely iambic meter with
 19 repeating short end-line rhyming words, and enjambment – the flow of one line into
 20 another – to result in a fluid and conversational pace. *Shake It Off*, in contrast, uses a
 21 combination of iambic and trochaic feet, alternating stressed and unstressed syllables,
 22 strong end-pauses, and repetition to create an aggressive, staccato pace. Facts 205-08.
 23 Plaintiffs' expert agrees, although he does not believe the lyrics' different paces are
 24 relevant. See Facts 205-06; cf. [Benay, 607 F.3d at 624](#) (extrinsic test applicable to
 25 literary work focuses on, *inter alia*, pace).

26 (viii) Dialogue

27 Plaintiffs' expert agrees, and it is uncontroverted, that other than a few scattered
 28 prepositions, articles, or pronouns, the words spoken or sung in *Playas* and *Shake It*

1 *Off* are all different with the sole exception that each has a different variation of the
 2 public domain phrases “players gonna play” and “haters gonna hate.” Facts 211,
 3 213-14, 217, 219. The only claimed similarity is that the variations on those two
 4 public domain phrases are the first two of four tautophrases in the songs’ respective
 5 choruses and are used – Plaintiffs contend – to convey the idea that the world is full
 6 of untrustworthy people who should be ignored. Fact 83.

7 But it is undisputed that tautophrases, parallel phrases, and even parallel
 8 tautophrases appear in music prior to *Playas* (Facts 111-16), that each of the four
 9 tautophrases in *Playas* is unprotected (Facts 94-95, 100-01, 104-05, 108-09), and that
 10 *Playas* and *Shake It Off* have different tautophrases organized differently
 11 (Facts 117-33). In addition, Plaintiffs’ expert agrees that the claimed shared idea that
 12 people are untrustworthy is commonplace and not a substantial similarity.
 13 Facts 84-85. *See also Berkic, 761 F.2d at 1293* (claimed similarity at “[a]t a very high
 14 level of generality” unprotected); *Kouf, 16 F.3d at 1046* (“[A] life struggle of kids
 15 fighting insurmountable dangers” is an unprotected idea).

16 As a result, there is no genuine dispute that the only similarity in dialogue is
 17 two public domain phrases used differently, commonplace practices of tautophrases
 18 and parallelism, and the claimed abstracted idea that people are untrustworthy.

19 **(ix) As Literary Works, the Songs’ Lyrics Are Not**
 20 **Substantially Similar in Protected Expression**

21 Applying the extrinsic test for literary works ignores that *Playas* and *Shake It*
 22 *Off* are songs and their lyrics are set to very different music. Nevertheless, “tak[ing]
 23 care to inquire only whether ‘the *protectible elements, standing alone*, are
 24 substantially similar’ [and to] filter out and disregard the non-protectible elements,”
 25 the extrinsic test for literary works also confirms that the songs’ lyrics are not
 26 substantially similar in protected expression. *Cavalier, 297 F.3d at 822* (quoting
 27 *Williams, 84 F.3d at 588*).

28 ///

**(4) Applying the Extrinsic Test to Plaintiffs’ Alternative
Selection-and-Arrangement Argument**

As an alternative theory, Plaintiffs have argued that *Playas*’ sequence of four tautophrases is an original selection and arrangement that is substantially similar to *Shake It Off*’s lyrics. Indeed, Plaintiffs claim the Court of Appeals already determined that the “four-part lyrical sequence” is a protected selection and arrangement. *See, e.g.,* [Pltfs’ Supp. Memo. re Mtn. to Dismiss \(Doc. 62\) at 4:2-8](#).

However, the Court of Appeals merely ruled that Plaintiffs “plausibly *alleged* originality,” not that they had *proven* originality, and the Court of Appeals did not consider the separate and distinct issue of whether *Shake It Off* is substantially similar to *Playas*. [Hall](#), 786 F. App’x at 712, 712 n.1 (emphasis added); *see also* [Mortimer v. Baca](#), 594 F.3d 714, 720 (9th Cir. 2010) (law of the case “doctrine does not apply to issues not addressed by the appellate court.”) (quoting [United States ex rel. Lujan v. Hughes Aircraft Co.](#), 243 F.3d 1181, 1186 (9th Cir. 2001)); [Behrens v. Pelletier](#), 516 U.S. 299, 309 (1996) (appeal from [Fed. R. Civ. P. 12\(b\)\(6\)](#) dismissal turns on pleading, while summary judgment turns on evidence). Further, the en banc decision in [Skidmore](#), 952 F.3d 1051 clarifies the requirements for a selection and arrangement claim and governs the claim now. [Mortimer](#), 594 F.3d at 721 (intervening controlling authority renders law of the case doctrine inapplicable).

Accordingly, Defendants properly raise that there is no merit to Plaintiffs’ alternative selection-and-arrangement theory.

**(i) The Allegedly Copied Elements Are Not Protected as
an Original Selection and Arrangement**

“[C]opyright protection [extends] to ‘a combination of unprotectable elements ... only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.’” [Skidmore](#), 952 F.3d at 1074 (quoting [Satava](#), 323 F.3d at 811). “Put another way, what a selection and arrangement copyright protects is the *particular*

1 way in which the artistic elements form a coherent pattern, synthesis, or design.”
 2 Skidmore, 952 F.3d at 1074.

3 Here, Plaintiffs claim originality in the allegedly copied sequence of four short,
 4 public domain phrases, “Playas, they gon’ play,” “haters, they gonna hate,” “Ballers,
 5 they gon’ ball,” and “Shot callers, they gonna call.” Facts 70, 94-95, 100-01, 104-05,
 6 108-09. While originality is a “low threshold, copyright *does* require at least a
 7 modicum of creativity.” Skidmore, 952 F.3d at 1069. Moreover, “[b]ecause many
 8 works of art can be recast as compilations of individually unprotected constituent
 9 parts,” care must be taken that selection-and-arrangement claims are not “at variance
 10 with maintaining a vigorous public domain.” *Id.* at 1075-76; Rentmeester, 883 F.3d
 11 at 1117. These considerations support the conclusion that *Playas*’ sequence of four
 12 bare, unprotected short phrases lacks sufficient originality.

13 However, the Court need not decide that issue because four public domain short
 14 phrases are not “numerous enough ... that their combination constitutes an original
 15 work of authorship.” Skidmore, 952 F.3d at 1074 (quoting Satava, 323 F.3d at 811).
 16 Plaintiffs have acknowledged the case law finding a greater number of unprotected
 17 elements insufficient. *See, e.g.,* Satava, 323 F.3d at 811-812 (six elements in
 18 sculptural work not “numerous enough”); Lamps Plus, Inc. v. Seattle Lighting Fixture
 19 Co., 345 F.3d 1140, 1147 (9th Cir. 2003) (five elements in lamp insufficient). But
 20 Plaintiffs have argued that the requirement of numerous elements applies only to
 21 physical objects. *See, e.g.,* Pltfs’ Supp. Memo. re Mtn. to Dismiss at 4:12-5:2.
 22 Skidmore puts that argument to rest by reaffirming, in a music case, the requirement
 23 of numerous elements and, in doing so, quoting Satava and finding that five public
 24 domain musical elements fail to constitute an original selection and arrangement.
 25 Skidmore, 952 F.3d at 1074; *see also* Corbello v. Valli, 974 F.3d 965, 974 n.2 (9th Cir.
 26 2020) (historical facts and other unprotected elements in book not numerous enough);
 27 *see also* Masterson v. Walt Disney Co., 821 F. App’x 779, 782 (9th Cir. 2020) (alleged
 28 copying of five unprotected elements in book of poems insufficient).

Accordingly, Plaintiffs' claim of an allegedly copied original selection comprised of only four public domain elements fails.

(ii) *Shake It Off* Selects and Arranges the Unprotected Elements Differently

Even if Plaintiffs could raise a genuine dispute as to whether four public domain short phrases constitute an original selection and arrangement, the lyrics of *Shake It Off* are not substantially similar to that claimed selection and arrangement.

"[A] selection and arrangement copyright is infringed only where the works share, in substantial amounts, the 'particular,' *i.e.*, the 'same,' combination of unprotectable elements." Skidmore, 952 F.3d at 1075 (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349, 350-51 (1991)). That plainly is not the case here.

Shake It Off does not even use two of *Playas*' four public domain elements at all: "ballers gonna ball" and "shot callers gonna call" simply do not appear in *Shake It Off*. Facts 123-28. Also, *Playas*' four tautophrases are in an uninterrupted sequence but *Shake It Off* has two tautophrases, followed by three lines of lyrics that do not appear in *Playas*, followed by two more tautophrases that also do not appear in *Playas*. Facts 129-33. In short, *Playas* has a four-part lyrical sequence but *Shake It Off* does not. In addition, the player and hater phrases in *Playas* and *Shake It Off* are different – *e.g.*, the unique repetition of "play" and "hate" in *Shake It Off* is completely absent from *Playas*, and all the lyrics are set to different harmonies, rhythms, and melodies. Facts 119-22, 48-68. *Shake It Off* does not include "the 'particular,' *i.e.*, the 'same,'" sequence of four public domain tautophrases present in *Playas*. Skidmore, 952 F.3d at 1075 (quoting Feist, 499 U.S. at 349, 350-51). For that additional reason, there is no genuine dispute that Plaintiffs' selection-and-arrangement theory fails.

Whether analyzed as musical works, literary works, or a claimed selection and arrangement, *Shake It Off* and *Playas* are not substantially similar in protected expression under the extrinsic test and summary judgment should be granted.

(c) **Plaintiffs Also Fail to Raise a Genuine Dispute as to Substantial Similarity Probative of Copying**

(1) **The Requirement that Plaintiffs Prove Substantial Similarity Probative of Copying**

“[A]bsent copying, there can be no infringement of copyright, regardless of the extent of similarity.” [2 NIMMER ON COPYRIGHT § 8.01\[A\]](#); [Skidmore, 952 F.3d at 1064](#) (“[A] plaintiff must prove that a defendant copied the work.”). Copying is proven circumstantially by evidence of either (1) “striking similarity,” or (2) access plus substantial similarities that are probative of copying. [Malibu Textiles, Inc. v. Label Lane Int’l, Inc., 922 F.3d 946, 952 \(9th Cir. 2019\)](#).

“Two works are strikingly similar when the similarities between them are so great that they are ‘highly unlikely to have been the product of independent creation.’” [Id. at 953](#) (quoting [Rentmeester, 883 F.3d at 1124](#)). “In other words, as a matter of logic, the only explanation for the similarities between the two works must be ‘copying rather than ... coincidence, independent creation, or prior common source.’” [4 NIMMER ON COPYRIGHT § 13.02\[B\]](#) (quoting [Skidmore, 952 F.3d at 1064](#)).

Plaintiffs do not claim *Playas* and *Shake It Off* are strikingly similar. Facts 243-244.

As a result, to raise a genuine dispute as to whether copying occurred, Plaintiffs would have to present evidence of both access and substantial similarities probative of copying. Further, the existence or degree of access does not affect the plaintiff’s obligation to present evidence of substantial similarities probative of copying. [Skidmore, 952 F.3d at 1068-69](#) (inverse ratio rule rejected). Because “access ... in no way can prove substantial similarity” (*id.*), proving substantial similarities probative of copying is a separate and distinct requirement Plaintiffs must satisfy.

(2) **The Differences and Lack of Significant Similarity Is Consistent with Independent Creation, Not Copying**

Substantial similarities probative of copying “show[] that the similarities between the two works are due to ‘copying rather than ... coincidence, independent

creation, or prior common source.” Skidmore, 952 F.3d at 1064 (quoting Bernal v. Paradigm Talent & Literary Agency, 788 F. Supp. 2d 1043, 1052 (C.D. Cal. 2010)). “A finding of such similarity may be based on the overlap of unprotectable as well as protectable elements.” Skidmore, 952 F.3d at 1064. “They just need to be similarities one would not expect to arise if the two works had been created independently.” Rentmeester, 883 F.3d at 1117. Conversely, if the similarities are few or present in other works, they fail to establish “copying rather than ... coincidence, independent creation, or prior common source.” Skidmore, 952 F.3d at 1064 (alteration in original) (quoting Bernal, 788 F. Supp. 2d at 1052); Smith, 84 F.3d at 1219 (“similarities that plaintiffs attribute to ‘copying’ could actually be explained by the commonplace presence of the same or similar motives within the relevant field.”).

Here, Plaintiffs’ claimed substantial similarities are both few and already present in songs and popular culture – from television shows to clothing – when *Shake It Off* was created in 2014. Facts 245-299. The only similar words are each songs’ respective variations of the public domain “players gonna play” and “haters gonna hate” phrases that appear in multiple media in songs before 2014, including, for example, Eric Church’s 2013 *The Outsiders* (“the player’s gonna play and a haters gonna hate”). Fact 255. Tautophrases are commonplace, including in music. Fact 111. Further, *Shake It Off* uses the preexisting “player gonna play” and “haters gonna hate” phrases and the idea of tautophrases differently than *Playas* uses them. Facts 119-22, 129-30, 133. Also, it is undisputed that *Shake It Off*’s music, all of its other lyrics, and the story told in the lyrics, are different from *Playas*. Facts 48-68, 70-82, 143-44, 148-49. While sharing the same title may be a similarity probative of copying (Benay, 607 F.3d at 628), the two songs have different titles.

The undisputed fact that *Playas* and *Shake It Off* are different in all respects – except only the use of preexisting player and hater phrases and the idea of tautophrases, which uses are different in each song – is consistent with *Shake It Off*’s having “been created independently” (Rentmeester, 883 F.3d at 1117) and fails to

1 prove “copying rather than ... coincidence, independent creation, or prior common
 2 source.” Skidmore, 952 F.3d at 1064 (alteration in original) (quoting Bernal, 788 F.
 3 Supp. 2d at 1052). As a result, Plaintiffs also fail to raise a genuine dispute as to
 4 substantial similarity probative of copying.

5 **3. CONCLUSION**

6 Plaintiffs and their expert admit that *Playas* and *Shake It Off* are very different
 7 songs both in music and lyrics and the only similarity is a portion of lyrics with
 8 different variations of two public domain tautophrases, plus two other completely
 9 different tautophrases, all organized differently. The extrinsic test establishes there is
 10 no genuine dispute that, whether analyzed as musical works, as literary works, or
 11 under a selection-and-arrangement theory, *Shake It Off* is not substantially similar in
 12 protected expression to *Playas*. That, alone, disposes of Plaintiffs’ claim.

13 In addition, there is a second and separate defect: the presence of different
 14 versions of two public domain tautophrases used differently in two songs, which also
 15 are otherwise very different in music and lyrics, falls short of substantial similarity
 16 probative of copying as opposed to independent creation.

17 Defendants respectfully submit that their Motion should be granted.

18
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/s/ Peter Anderson

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