

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA MUSIC, ARISTA RECORDS
LLC, ATLANTIC RECORDING
CORPORATION, ELEKTRA
ENTERTAINMENT GROUP INC.,
LAFACE RECORDS LLC, SONY
MUSIC ENTERTAINMENT, UMG
RECORDINGS, INC., WARNER BROS.
RECORDS INC., and ZOMBA
RECORDING LLC,

Plaintiffs,

v.

ESCAPE MEDIA GROUP INC.,
SAMUEL TARANTINO, JOSHUA
GREENBERG, PAUL GELLER,
BENJAMIN WESTERMANN-CLARK,
JOHN ASHENDEN, CHANEL
MUNEZERO, and NIKOLA
ARABADJIEV,

Defendants.

11 Civ. 8407(TPG)

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO
DISMISS FILED BY DEFENDANTS ESCAPE MEDIA GROUP INC., SAMUEL
TARANTINO AND JOSHUA GREENBERG**

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INTRODUCTION

Defendants in this action operate a website called “Grooveshark” that acts as a virtual jukebox allowing its listeners to “listen to any song in the world” for free. The Plaintiffs are record companies which collectively own the majority of copyrighted sound recordings sold in the United States. Despite the fact that virtually every popular sound recording that Plaintiffs own is available for free on Grooveshark, Defendants have no license or authorization from Plaintiffs to use those recordings. Instead, sound recordings belonging to Plaintiffs are infringed millions of times on a daily basis through Defendants’ service.

While the scope of infringement occurring through Defendants’ website is massive, the Amended Complaint in this action targets a smaller universe of infringing acts. The Amended Complaint seeks to hold four executives and long-time employees of defendant Escape Media, Inc. (“Escape”), John Ashenden, Benjamin Westermann-Clark, Chanel Munezero, and Nikola Arabadjiev (together the “Employee Defendants”) liable for the sound recordings that they personally copied to the website and intended to be distributed to millions of users. The Amended Complaint also seeks to hold Samuel Tarantino, Joshua Greenberg, and Paul Geller (together the “Executive Defendants”) and Escape liable for the sound recordings that they and their employees uploaded at their direction and for their benefit.

Rule 8 of the Federal Rules of Civil Procedure requires a plaintiff to put a defendant fairly on notice of the basis of the underlying claim. As discussed at length below, the Amended Complaint exceeds the required level of detail for a pleading in federal court. In addition to the numerous factual allegations identifying the bases for the asserted claims, Plaintiffs attached three lists which collectively identify over 2,000 sound recordings that are at issue in this case. Plaintiffs own each of the sound recordings on that list and each of those sound recordings has

been and continues to be infringed by the Defendants. Based on this series of allegations, Defendants are fairly on notice of the claims against them.

Although a plaintiff is not required to identify the factual underpinnings of the allegations in a complaint to survive a motion to dismiss, Plaintiffs specifically advised Defendants that the factual foundation for these claims came from Defendants' own business records. Specifically, tables, databases, and other information produced by Escape to UMG Recordings, Inc. ("UMG") in a pending state court action in New York Supreme Court (the "State Court Action") provide much of the basis for these claims.

Defendants primary objections to the Amended Complaint are: (1) that Plaintiffs' list of over 2,000 works at issue in this case is not a complete list; (2) that each Defendant is not on individual notice of each work that he has infringed; (3) that the Amended Complaint allegedly does not identify the plaintiff that owns each work; and (4) that the Amended Complaint allegedly does not identify the time of the alleged infringement.

The allegations in the Amended Complaint are sufficient to state a claim under the controlling legal standards. There is no duty to file a final list of works at issue at the time a complaint is filed and Defendants have cited no cases supporting such a proposition. Moreover, each individual Defendant knows what sound recordings he uploaded to Defendants' website. While the fact that certain of the individual Defendants have personally copied *tens of thousands* of sound recordings might make it difficult to simply rely on memory, a permanent record of every single upload is maintained by Escape in a centralized database that is easily accessible to them. For Defendants, creating a list of the recordings that they have each infringed is as simple as sorting a spreadsheet. Further, the lists attached to the Amended Complaint identify the

owners of the relevant sound recordings. Finally, by alleging ongoing infringement, Plaintiffs have adequately identified the time of the infringement.

Apart from the sufficiency of the pleadings contained in the Amended Complaint, there is no question that the Defendants fully understand the nature of the charges against them. As noted above, in the ordinary course of their business, Defendants have created [REDACTED]. In fact, had the Defendants simply acceded to Plaintiffs' request to declassify certain non-confidential data produced in the State Court Action, Plaintiffs could have compiled an even more comprehensive and detailed list of works at issue. One cannot reconcile Defendants' professed need for additional detail with their efforts in both the state court and before this Court to prevent the dissemination and use of information they created which provides that very detail. In fact, it is hard to avoid the conclusion that the instant motion is anything more than Escape's attempt to use the confidentiality order in the state court action to shield it from liability for its illegal acts or, at least, delay the prosecution of this action.¹

Defendants are clearly on notice of the conduct that gives rise to the claim against them, and they have all of the data necessary to investigate and respond to Plaintiffs' allegations. For the reasons that follow, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss the Amended Complaint.²

¹ It should be noted that, while UMG was free to use the data reflecting Defendants' illegal uploads of its sound recordings (and did so in creating its list of works at issue), until days before the filing of this brief, it was not permitted to provide details of Defendants' illegal uploading of the other Plaintiffs' sound recordings to the other plaintiffs and it was limited in its ability to use other evidence of Escape's guilt. Detailed facts related to Escape's attempt to keep evidence of its illegal conduct from Plaintiffs and the Court is contained in the Declaration of Gianni P. Servodidio at ¶¶ 8-14 (hereinafter "Servodidio Decl.").

² Plaintiffs submit this brief in response to the Notice of Motion of Defendants Escape, Tarantino, and Greenberg as well as to the Notice of Motion of the remaining defendants. Because the remaining defendants did not fully brief these issues—and instead relied on a reference to the brief of Escape,

STATEMENT OF FACTS

The Amended Complaint contains detailed allegations about the operation of Defendants' website and the relevant infringing conduct. Except where noted, the following allegations are taken directly from the Amended Complaint.

The Plaintiffs

Plaintiffs, who are part of the Universal Music Group, Warner Music Group, and Sony Music Entertainment, are the owners or exclusive United States licensees of sound recordings containing the performances of some of the most popular and successful recording artists of all-time. Am. Compl. at ¶ 32. Together, they own and operate many of the most iconic record labels in the world, including A&M, Arista, Asylum, Atlantic, Columbia, Decca, Elektra, Epic, Geffen, Interscope, Island Def Jam, Motown, RCA, Reprise, and Verve. *Id.* at ¶ 31. As a group, Plaintiffs own the large majority of copyrighted sound recordings sold in the United States. *Id.* at ¶ 32.

Defendants and the Grooveshark Website

Defendant Escape owns and operates a website, www.grooveshark.com, (the "Grooveshark website") that acts as a virtual jukebox, providing its users with free access to unauthorized copies of "any song in the world." Am. Compl. at ¶ 1. Defendant Samuel Tarantino is the Chief Executive Officer of Escape and defendant Joshua Greenberg is its Chief Technology Officer and the lead architect of the website and accompanying system. [REDACTED] Paul Geller is also a senior Escape executive with knowledge of and control over the infringing aspects of the

Tarantino, and Greenberg—Plaintiffs have filed this brief in connection with the former Notice of Motion.

website. John Ashenden, Benjamin Westermann-Clark, Chanel Munezero, and Nikola Arabadjiev are long-time Escape executives and employees.

Escape publicly touts the fact that it makes a catalog of 15 million sound recordings available on demand, including Plaintiffs' most popular sound recordings by top commercial artists such as Michael Jackson, Bob Marley, Madonna, Led Zeppelin, Green Day, Elton John, Jay-Z, and Lady Gaga. *Id.* at ¶ 2. Escape claims that it has 30 million unique users per month. Servodidio Decl., Ex. H. Escape does not have a license or other authorization from Plaintiffs or from the owners of the copyrights in the vast majority of the sound recordings contained on the site. *Id.*

Escape and its executives have explicitly acknowledged that the Grooveshark website is being used to infringe millions of sound recordings. For example, Escape's senior director has admitted that Escape has "bet the company on the fact that it is easier to beg forgiveness than ask permission" from record labels to exploit their music. *Id.* at ¶ 3. Escape has also admitted that it owes record companies for using their sound recordings without permission, and it has acknowledged to some of the Plaintiffs that it "cannot be a real company until and unless we secure licenses" to the sound recordings it uses without permission. *Id.* at ¶ 4.

Defendants Have Infringed Thousands of Plaintiffs' Sound Recordings

Escape's entire business is premised on being "the world's largest on-demand and music discovery service." *Id.* at ¶ 34. Obtaining a collection of 15 million sound recordings through legitimate means is not an easy task. But Escape does not use legitimate means to obtain the sound recordings that it relies on for its business. Instead, Escape encourages its employees and its users to copy music to the Grooveshark website. *Id.* at ¶¶ 5, 36, 37, 38. Once copied, those recordings become available to every user of the service. *Id.* at ¶ 34.

Having a core group of popular sound recordings was—and remains—essential to being able to attract and retain users. *Id.* at ¶ 36. As a result, Escape’s CEO, officers, and employees took on the direct responsibility for “seeding” (*i.e.* uploading) a significant volume of infringing content to make sure it was available to users of the Grooveshark website. *Id.*

Based on public information and Escape’s own business records, Plaintiffs have—so far—been able to confirm that Defendants and other Escape employees have uploaded more than 100,000 sound recordings to the Grooveshark website. *Id.* at ¶ 38. In addition, Plaintiffs have identified, to date, over 2,000 specific sound recordings that they own that Defendants have unlawfully copied. *Id.* at ¶ 39. The copyright infringement committed by Defendants begins on the date that they copied a specific sound recording to the Grooveshark website and continues to the present day because once a sound recording is copied to the Grooveshark website it becomes continuously available to all users of the website. *Id.* at ¶ 39.

ARGUMENT

I. PLEADING STANDARDS

The Federal Rules of Civil Procedure require that a plaintiff’s complaint need only supply “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A plaintiff is not required to allege the specific facts underlying its general allegations. As the Supreme Court has repeatedly held, “[s]pecific facts are not necessary; the statements need only give the defendants fair notice of what the . . . claim is and the grounds upon which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (additional quotations omitted).

At the pleading stage, “general allegations [are presumed to] embrace those specific facts that are necessary to support the claim.” *Lujan v. Defenders of Wildlife*, 497 U.S. 871, 889 (1990); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th Cir. 2002). Thus, as the Supreme

Court has observed, “[t]his simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

Accordingly, an argument that a plaintiff has not “come forward with specific facts” is not an appropriate basis for a motion to dismiss. See *S.W.B. New Eng., Inc. v. R.A.B. Food Grp., LLC*, No. 06 Civ. 15357(GEL), 2007 U.S. Dist. LEXIS 43401, at *11 (S.D.N.Y. June 13, 2007). “The uncovering of ‘specific facts’ is the goal of discovery - generally, a party is neither expected nor required to state the ‘specific facts’ of its claims in its pleadings.” *Id.*; see also *Elektra Entm’t Grp., Inc. v. Santangelo*, No. 05 Civ. 2414(CM), 2005 U.S. Dist. LEXIS 30388, at *3 (S.D.N.Y. Nov. 28, 2005) (to satisfy federal notice pleading under Fed. R. Civ. P. 8(a), “[p]laintiffs need only give notice of their claim, leaving ‘factual details and evidentiary issues [to be] developed during discovery’”).

The liberal notice pleading policy that applies to copyright claims is “not meant to impose a great burden upon a plaintiff” and does not impose any heightened requirements beyond Rule 8 of the Federal Rules of Civil Procedure. *Elektra Entm’t Grp. v. Barker*, 551 F. Supp. 2d 234, 238 (S.D.N.Y. 2008) (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). Indeed, in the copyright context, “the specificity required of the complaint is not great.” *Maverick Recording Co. v. Goldshteyn*, No. 05 Civ. 4523(DGT), 2006 U.S. Dist. LEXIS 52422, at *7 (S.D.N.Y. July 31, 2006). Courts have repeatedly held that a plaintiff in a copyright action is “not required to state with particularity specific infringing acts or the times of such acts.” *Capitol Records, Inc. v. Wings Digital Corp.*, 218 F. Supp. 2d 280, 284 (E.D.N.Y. 2002); accord *Maverick Recording Co.*, 2006 U.S. Dist. LEXIS 52422, at *7; *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1120 (C.D. Cal. 2001) (citing *Mid Am. Title Co. v. Kirk*,

991 F.2d 417, 421 (7th Cir. 1993)). Rather, “[o]nce there has been notice of the claim, factual details and evidentiary issues . . . should be developed during discovery.” *Wings Digital Corp.*, 218 F. Supp. 2d at 284.

The sole exception to the policy reflected in Rule 8 relates to claims alleging fraud and mistake, which are subject to the heightened pleading requirements of Rule 9(b). However, the Supreme Court has expressly declined to extend heightened pleading requirements to other contexts. See *Swierkiewicz*, 534 U.S. at 513; *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-69 (1993).

II. THE AMENDED COMPLAINT ADEQUATELY ALLEGES COPYRIGHT INFRINGEMENT.

In order to plead a prima facie case of copyright infringement, a plaintiff must generally allege (1) which specific original work is the subject of the claim; (2) that plaintiff owns the copyright in the work; (3) that the copyright has been registered in accordance with the Copyright Act; and (4) by which acts during what time the defendant infringed the copyright. *Barker*, 551 F. Supp. 2d at 238.

In this case, Plaintiffs have adequately alleged each of the elements of a copyright infringement cause of action.

A. Plaintiffs Have Alleged Specific Sound Recordings Infringed, as well as Ownership and Registration of Those Sound Recordings.

In order to satisfy the first three elements for pleading a copyright infringement claim, plaintiffs need only allege (i) works at issue in the case; (ii) that plaintiffs own the works at issue; and (iii) that the works have been validly registered with the Copyright Office. *Id.*

Plaintiffs satisfied the first element of this test by attaching lists of over 2,000 specific sound recordings owned by Plaintiffs that Defendants copied to the Grooveshark website. Am.

Compl., Exs. G, H, & I. Plaintiffs have satisfied the second and third elements of the test by alleging that they own the copyrights in these sound recordings and by providing the copyright registration numbers for each of the sound recordings that they identified. *Id.* at ¶¶ 39, 43, 45, and Exs. G, H, & I. These allegations satisfy the first three requirements for pleading a claim for copyright infringement. *See Santangelo*, 2005 U.S. Dist. LEXIS 30388, at *5-6.

1. Plaintiffs Are Entitled to Rely on a Preliminary List of Works

Defendants do not dispute that the Amended Complaint adequately identifies specific works at issue—at least as to the more than 2,000 works attached as Exhibits G, H, and I to the Amended Complaint. Instead, they argue that the Amended Complaint fails because it does not list “all of the specific original works” that underlie the claims. Def’s. Br. at 7 (quotations omitted). There is no legal foundation for such an argument. The case law confirms that as long as specific works are identified, a complaint need not allege each specific work infringed. Instead, once a plaintiff has adequately stated a claim with respect to certain works, any question as to what other works are the subject of the complaint may be explored during discovery. *E. Broad. Am. Corp. v. Universal Video, Inc.*, No. CV-04-5654(DGT), 2006 U.S. Dist. LEXIS 17032, at *8-9 (E.D.N.Y. Mar. 24, 2006) (finding that complaint adequately alleged works infringed where it listed one specific video and stated that defendants had infringed “other” titles as well.); *see also Tin Pan Apple v. Miller Brewing Co.*, 737 F. Supp. 826, 828 (S.D.N.Y. 1990) (finding a complaint sufficient where plaintiff alleged that “one or more” of its songs had been infringed by defendant).

What defendants are really arguing is that Plaintiffs must identify every work at issue at the time they file their complaint. However there is no basis in law for such an argument. Where, as here, the facts identifying all of the infringements are in the possession of the

Defendants, Plaintiffs must merely identify works at issue to commence the action and then may supplement that list as a result of discovery.³

In arguing that Plaintiffs' lists are inadequate "representative lists," Defendants rely on two inapposite cases where the Plaintiff failed to plead *any specific works*, thereby failing to state a claim at all. *See* Def's. Br. at 7 (citing *DiMaggio v. Int'l Sports Ltd.*, No. 97 Civ. 7767(HB), 1998 U.S. Dist. LEXIS 13468, at *5 (S.D.N.Y. Aug. 31, 1998); *Cole v. Allen*, 3 F.R.D. 236, 237 (S.D.N.Y. 1942)). In this case, Plaintiffs have specified over 2,000 specific works at issue.

It bears repeating that Defendants possess the very information necessary to determine the full scope of the works at issue. Each individual defendant knows exactly what sound recordings he has uploaded to the Grooveshark website. Moreover, Escape is in [REDACTED]

[REDACTED] Finally, as discussed at length above, the primary reason it was impossible for Plaintiffs to give a more complete list at the time the Amended Complaint was filed is a result of Escape's misuse of the state court confidentiality order.⁴

³ This is especially true in cases involving multiple infringed works, where the evidence of infringement lies primarily in the hands of the infringer. Under such circumstances, plaintiffs routinely proceed by attaching "preliminary lists" of infringed works. *See, e.g.*, Complaint in *Arista Records LLC v. Lime Wire LLC*, No. 06 Civ. 5936 (KMW)(DCF), S.D.N.Y., Docket # 45; *Capitol Records, Inc. v. MP3tunes LLC*, No. 07 Civ. 9931 (WHP)(FM), S.D.N.Y., Docket # 91; *Disney Enterprises, Inc. v. Hotfile Corp*, No. 11 Civ. 20427, S.D.FI, Docket # 1. Once discovery reveals the full scope of infringement, the preliminary list is expanded—through amendment or court order. By framing a list as "preliminary," a plaintiff is simply putting a defendant on notice that the plaintiff expects additional acts of infringement will be added in the future. The fact that the list is preliminary does not mean that infringement of specific works identified in that list is inadequately alleged.

⁴ Given Escape's last-minute agreement to allow the other Plaintiffs access to the data reflecting employee uploads, Plaintiffs are now in a position to compile a more complete list of infringed works. However, doing so at this stage is a wholly unnecessary exercise for three reasons: (1) the Amended Complaint satisfies the requirements of Rule 8; (2) Defendants already have the same information in their possession; (3) discovery in this action will likely result in the identification of further works; therefore, creating an additional interim list would accomplish nothing but expense and delay.

2. Plaintiffs Have Adequately Alleged Ownership

Plaintiffs attached three exhibits listing the specific works infringed, the owners of those works, and the copyright registration number associated with them. *See* Am. Compl., Exs. G, H, & I. Exhibit G contains works belonging to UMG Recordings, Inc. Exhibit H contains works belonging to the plaintiffs included as part of Sony Music Entertainment, *i.e.* Arista Music, Arista Records LLC, LaFace Records LLC, Sony Music Entertainment, and Zomba Recordings, LLC. Exhibit I contains works belonging to the plaintiffs included as part of the Warner Music Group, *i.e.* Atlantic Recording Corporation, Elektra Entertainment Group, Inc., and Warner Bros. Records, Inc.

The fact that Plaintiffs chose to organize their lists of works infringed by record group does not undermine the adequacy of their pleading. First, Plaintiffs have, in fact, alleged which plaintiff owns which works for virtually all of the works. UMG Recordings, Inc. has alleged it is the owner of each of the 1808 sound recordings listed in Exhibit G. The remaining plaintiffs have provided copyright registration numbers for each of the works on Exhibits H and I, thereby incorporating by reference the copyright registration certificates listed. The information in those certificates, which is publicly available at www.copyright.gov, nearly always lists a named plaintiff as the owner of the referenced work. In the few cases where a registration certificate does not list a named plaintiff, Defendants will be entitled to explore Plaintiffs' ownership in discovery. *See e.g., Wings Digital Corp.*, 218 F. Supp. 2d at 284.

Defendants' argument fails for a second, more fundamental reason: pleading which specific work is owned by which plaintiff is not required by the law. Defendants cite to no authority holding that in cases involving multiple plaintiffs, each plaintiff must provide a separate list of works in suit. Indeed, at least one court in this district has declined to adopt such an approach. *See U2 Home Entm't, Inc. v. Lai Ying Music & Video Trading, Inc.*, No. 04 Civ.

1233(DLC), 2005 U.S. Dist. LEXIS 9853, at *9 (S.D.N.Y. May 25, 2005) (“To the extent that the defendants argue that the Complaint does not allege [plaintiff’s] ownership interest in any specific work nor how [plaintiff] obtained that interest, such particularity in pleadings is not required.”). Defendants’ demand for such a list cannot be reconciled with the Supreme Court’s admonition that, for purposes of a pleading, “[s]pecific facts are not necessary; the statements need only give the defendants fair notice of what the . . . claim is and the grounds upon which it rests.” *Erickson*, 551 U.S. at 93-94 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Defendants plainly have fair notice of the claims against them.

B. Plaintiffs Have Adequately Alleged Specific Acts of Infringement.

The fourth element of pleading a copyright infringement claim requires allegations showing by which acts and during what time the defendant infringed the copyright. *Barker*, 551 F. Supp. 2d at 238. The law is clear that the fourth element of an infringement claim is not intended to alter the liberal pleading requirements of Rule 8 by requiring specific details. Courts have repeatedly held that a plaintiff in a copyright action is “not required to state with particularity specific infringing acts or the times of such acts.” *Wings Digital Corp.*, 218 F. Supp. 2d at 283; *accord Maverick Recording Co.*, 2006 U.S. Dist. LEXIS 52422, at *7; *Cybernet*, 167 F. Supp. 2d at 1120 (citing *Mid Am. Title Co. v. Kirk*, 991 F.2d 417, 421 (7th Cir. 1993)).⁵

⁵ Defendants primarily rely on *Jacobs v. Carnival Corp.*, No. 06 Civ. 606(DAB), 2009 U.S. Dist LEXIS 31374 (S.D.N.Y. March 25, 2009) for the proposition that a complaint must allege a specific time that an act of infringement occurred. *See* Def’s Br. at 8. The reason that the Court in *Jacobs* required some specificity as to the timing of infringement was because the alleged infringement occurred on a cruise ship that was at sea—and thus outside the jurisdiction of the United States Copyright Act most of the time. As a result, allegations that infringement occurred on the ship failed to state a claim under the Copyright Act. In this way, *Jacobs* is entirely consistent with the general rule that, with respect to copyright claims, “dismissals are generally limited to unique situations, such as where the allegedly infringing acts occurred wholly outside the United States[.]” *Franklin Elec. Publishers, Inc. v. Unisonic Products Corp.*, 763 F.Supp. 1, 4 (S.D.N.Y. 1991).

Instead, general allegations that a defendant “manufactured, reproduced, imported, and distributed” infringing devices are sufficient to satisfy the requirement that a plaintiff plead an infringing act. *Wings Digital Corp.*, 218 F. Supp. 2d at 284. Similarly, alleging that a defendant engaged in “importation or duplication” of copyrighted motion pictures has been held to state “the basis for recovery with sufficient clarity” for Rule 8 purposes. *U2 Home Entm’t*, 2005 U.S. Dist. LEXIS 9853, at *9; *see also Home & Nature, Inc. v. Sherman Specialty Co.*, 322 F. Supp. 2d 260, 266 (E.D.N.Y. 2004).

In this case, Plaintiffs have gone far beyond the general allegations that courts routinely find sufficient for pleading purposes. Specifically, Plaintiffs have alleged that:

- (1) “Escape’s own CEO, officers and employees took on the direct responsibility for “seeding” (*i.e.*, uploading) a significant volume of infringing content to make sure it was available to users of the Grooveshark website.” Am. Compl. at ¶ 36;
- (2) “the most popular sound recordings available on the Grooveshark website are regularly uploaded by Escape’s employees at the direction of Escape and the Executive Defendants.” *Id.* at ¶ 37;
- (3) “Escape’s business records confirm that Tarantino, Greenberg and Geller (collectively referred to as the “Executive Defendants”) have personally uploaded thousands of infringing copies of copyrighted sound recordings including hundreds of infringing copies of Plaintiffs’ copyrighted sound recordings to the Grooveshark website.” *Id.* at ¶ 21;
- (4) “In addition, these Executive Defendants have directed the uploading of tens of thousands of additional recordings including thousands of Plaintiffs’ recordings, have exercised control over the infringing activities described herein and have personally benefitted from this infringing activity through their ownership interest in the company.” *Id.*;
- (5) “Escape’s business records confirm that Ashenden, Westermann-Clark, Munezero and Arabadjiev (the “Employee Defendants”) have engaged in systematic and widespread illegal uploading of Plaintiffs’ copyrighted content to the Grooveshark website. Acting pursuant to the direction of Escape and the Executive Defendants, the Employee Defendants have copied tens of thousands of sound recordings, including thousands of sound recordings belonging to Plaintiffs, and uploaded them to the Grooveshark website.” *Id.* at ¶ 26;

(6) “records of user uploads maintained by Escape demonstrate that the Executive and Employee Defendants, together with other Escape employees, have uploaded more than 100,000 sound recordings to the Grooveshark website.” *Id.* at ¶ 38;

(7) “Escape’s business records establish unequivocally that the sound recordings illegally copied by Escape’s executives and employees include thousands of well known sound recordings owned by Plaintiffs—and it is these sound recordings that form the basis of this lawsuit.” *Id.* at ¶ 5; and

(8) “The recordings uploaded by Escape’s own officers and employees include thousands of recordings owned by Plaintiffs” including those works listed on Exhibits G, H, and I. *Id.* at ¶¶ 39, 43.

In addition to alleging the specific acts of infringement, Plaintiffs have adequately alleged the timeframe covered by their allegations. As an initial matter, the case law is clear that, “[a] plaintiff need not provide a description of the individual instances or exact times of infringement.” *Maverick Recording Co.*, 2006 U.S. Dist. LEXIS 52422, at *8; *Wings Digital Corp.*, 218 F. Supp. 2d at 284. Rather, alleging that a Defendant has infringed and continues to infringe a plaintiff’s copyrights satisfies Rule 8. *Maverick Recording Co.*, 2006 U.S. Dist. LEXIS 52422, at *10; *Santangelo*, 2005 U.S. Dist. LEXIS 30388, at *6; *Home & Nature*, 322 F. Supp. 2d at 266; *Franklin Elec. Publishers, Inc. v. Unisonic Products Corp.*, 763 F. Supp. 1, 4 (S.D.N.Y. 1991).

In this case, Plaintiffs have alleged a continuing violation of their copyrights. Plaintiffs specifically alleged:

(1) “As a direct result of [Defendants’] egregious and willful conduct, thousands of Plaintiffs’ most popular sound recordings are infringed daily on a massive scale.” *Id.* at ¶ 7;

(2) “Escape continues to blatantly and openly exploit [Plaintiffs’] copyrighted sound recordings without permission.” *Id.* at ¶ 4;

(3) “Defendants’ conduct is causing, and unless enjoined by this Court, will continue to cause Plaintiffs great and irreparable injury that cannot be fully compensated or measured in money damages.” *Id.* at ¶ 47.

Indeed, the whole purpose of uploading a song to the Grooveshark website is to make it available on an ongoing basis to every user. *See* Am. Compl. at ¶¶ 36, 38, 39. As a result, Plaintiffs alleged a continuing violation of each of their copyrighted sound recordings.

Additionally, Defendants are well aware when the alleged acts began. Defendants have in their possession [REDACTED] for the State Court proceedings. Servodidio Decl. ¶ 4. [REDACTED]

[REDACTED] Defendants do not have to wait for discovery to begin in order to learn the details of the infringements alleged in the Amended Complaint.

Finally, the fact that Plaintiffs have not attempted in the Amended Complaint to correlate each specific upload to a specific Defendant is not relevant to an analysis of Plaintiffs' pleadings. Adequately pleading the acts of infringement necessary to satisfy the fourth element of the pleading standard does not require an identification of which works have been infringed by which Defendant. Courts frequently find that allegations that defendants copied "one or more of their copyrighted sound recordings" are sufficient to satisfy the liberal pleading requirements of Rule 8. *Home & Nature*, 322 F. Supp. 2d at 266-67; *Tin Pan Apple*, 737 F. Supp. 826 at 828; *E. Broad. Am. Corp.*, 2006 U.S. Dist. LEXIS 17032, at *8. This rule should apply with even greater force in a case like this, where Defendants are in exclusive control of information that will show them exactly what works each of them uploaded and at what time. As noted above, the data created by Escape for use in the State Court Action lists each upload by each employee. Servodidio Decl. ¶ 4.

Moreover, Escape and the Executive Defendants are each responsible for every infringing act committed by their employees and co-workers since they participate in and benefit from

those acts of infringement. *See Sygma Photo News, Inc. v. High Soc'y Magazine, Inc.*, 778 F.2d 89, 92 (2d Cir. 1985) (“All persons and corporations who participate in, exercise control over or benefit from an infringement are jointly and severally liable as copyright infringers.”); *Stumm v. Drive Entm’t, Inc.*, No. 00 Civ. 4676(DC), 2001 U.S. Dist. LEXIS 21675, *15 (S.D.N.Y. Jan. 2, 2002) (“[A]n individual, including a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity, or who personally participates in that activity is personally liable for infringement”). As a result, there is no need to specify works for which these Defendants are liable, because they are each liable for all of them.

III. ESCAPE IS LIABLE FOR THE INFRINGING CONDUCT OF ITS EMPLOYEES.

In order to hold Escape liable for the infringing acts of its executives and employees, Plaintiffs need only plead that Escape (i) participated in the infringing activity; (ii) exercised control over the infringing activity; or (iii) stood to benefit from the infringing activity. *See Sygma Photo News, Inc.*, 778 F.2d at 92; *Stumm*, 2001 U.S. Dist. LEXIS 21675, at *15.

Alternatively, Escape is liable under principles of *respondeat superior*, which makes an employer liable for all acts of employees that are either undertaken within the scope of employment or are reasonably foreseeable as a consequence of Escape’s business. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 793 (1998); *Taber v. Maine*, 67 F.3d 1029, 1037 (2d Cir. 1995); *Rosenthal & Co. v. Commodity Futures Trading Comm’n*, 802 F.2d 963, 966 (7th Cir. 1986).

The Amended Complaint contains extensive allegations relating to each of these factors, including allegations that:

- (1) “Escape and its management have adopted a business model that is premised on massive willful copyright infringement.” Am. Compl. at ¶ 7;

(2) “Acting pursuant to the direction of Escape and the Executive Defendants, the Employee Defendants have copied tens of thousands of sound recordings, including thousands of sound recordings belonging to Plaintiffs, and uploaded them to the Grooveshark website.” *Id.* at ¶ 26;

(3) “Escape . . . has committed numerous tortious acts within the State of New York, including by encouraging its New York employees to upload infringing content to the Grooveshark website . . .” *Id.* at ¶ 27;

(4) “Defendants decided to create equity value for Escape and the Executive Defendants by exploiting [Plaintiffs’] sound recordings without authorization from or payment to copyright owners.” *Id.* at ¶ 35;

(5) “it is of critical importance to Escape that all popular recordings are available to its users. Accordingly, Escape’s own CEO, officers and employees took on the direct responsibility for “seeding” (*i.e.*, uploading) a significant volume of infringing content to make sure it was available to users of the Grooveshark website.” *Id.* at ¶ 36;

(6) “an Escape employee has publicly admitted that the most popular sound recordings available on the Grooveshark website regularly are uploaded by Escape’s employees at the direction of Escape and the Executive Defendants.” *Id.* at ¶ 37;

(7) “records of user uploads maintained by Escape demonstrate that the Executive and Employee Defendants, together with other Escape employees, have uploaded more than 100,000 sound recordings to the Grooveshark website in order to boost Escape’s library of infringing content and to make the service more attractive to prospective users[.]” *Id.* at ¶ 38;

(8) “The Employee Defendants have engaged in [the infringing] activity at the direction, for the benefit, and under the control of Escape and the Executive Defendants.” *Id.* at ¶ 39;

(9) “Defendants [] profit directly from their unlawful activities by, among other things: (a) selling advertisements that are displayed in conjunction with the sound recordings it unlawfully copies and distributes; (b) selling monthly subscriptions to users with the promise of greater access to infringing music; and (c) increasing venture capital investment and the value of its company to potential purchasers.” *Id.* at ¶ 40.

Given these specific allegations, Plaintiffs have clearly pled facts sufficient to hold Escape jointly and severally liable for the infringing conduct of its executives and employees. *See Sygma Photo News, Inc.*, 778 F.2d at 92; *Taber*, 67 F.3d at 1037. The fact that Plaintiffs have included claims against Escape’s three highest executive officers and a number of its long-

time employees makes clear that the conduct of its employees can be attributable to the corporation. *See Arista Records, LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 152 n.19 (S.D.N.Y. 2009).

In its attempt to manufacture a basis for moving to dismiss the Amended Complaint, Escape disingenuously ignores all but one of Plaintiffs' allegations, choosing to focus exclusively on paragraph 6 of the Amended Complaint, in which Plaintiffs describe a blog posting attributed to a Grooveshark employee (the "Employee Post"). However, the Amended Complaint provides much more. Accordingly, Escape's argument that the only basis for Plaintiffs' allegations with respect to Escape come from the referenced blog posting is demonstrably false may be summarily rejected. Moreover, Escape's request that the Court ignore the blog posting is based exclusively on inapposite case law addressing the heightened pleading requirements of Rule 9(d).

A. The Allegations Supporting the Claims Against Escape Are Based on Numerous Sources, Including Escape's Own Business Records.

As an initial matter, Plaintiffs are under no obligation to plead the specific factual basis for their claim that Escape is liable for the uploads of its employees or to identify the source of Plaintiffs' information. *Maverick Recording Co.*, 2006 U.S. Dist. LEXIS 52422, at *13 (plaintiffs may plead copyright infringement claims without alleging additional facts to show the source of their information."); *Santangelo*, 2005 U.S. Dist. LEXIS 30388, at *4; *see also S.W.B. New Eng., Inc.*, 2007 U.S. Dist. LEXIS 43401, at *11.

Nonetheless, Plaintiffs' Amended Complaint contains numerous allegations regarding Escape's conduct and resulting corporate liability that do not reference or rely on the Employee Post. *See e.g.*, Am. Compl. at ¶¶ 3, 26, 27, 35, 36, 38, 39, 40. For example, the Amended Complaint alleges that many of the most critical allegations are based on Escape's own business

records. *Id.* at ¶¶ 26, 38. Furthermore, other key allegations—such as allegations of Escape’s direct benefit from the infringing activity—have no connection to the Employee Post at all. *Id.* at ¶ 40. Still other key allegations make no mention of the Employee Post. *Id.* at ¶¶ 3, 27, 35, 36, 39, 40.

Escape’s attempt to make the Employee Post the lynchpin of its motion is a red herring. Because Plaintiffs have clearly pled facts that make Escape liable for the conduct of its employees under a number of theories, Escape’s motion must be denied irrespective of the reliability of the Employee Post.⁶

B. Plaintiffs Are Entitled to Rely on the Employee Post in the Amended Complaint.

Although the Amended Complaint states a cause of action against Escape even in the absence of the Employee Post, the law clearly allows Plaintiffs to include the Employee Post as an additional basis for their allegations. The law is well-settled that in evaluating a motion to dismiss, a court must accept all factual allegations as true and draw all reasonable inferences in favor of the plaintiff. *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010). As a result, Plaintiffs are entitled to a presumption that the facts in the Employee Post are accurate.

Relying on *Ashcroft v. Iqbal*, Defendants argue that the Employee Post is not entitled to a presumption of truth because it is “implausible,” but this argument misapprehends the ruling in *Iqbal* and misinterprets Plaintiffs’ allegations. The Supreme Court held in *Iqbal* that a

⁶ It should be noted that Escape would still be liable for its employees’ conduct under common-law principles even if the Employee Post and all of Plaintiffs’ other allegations on this point turn out to be false and Escape had explicitly forbidden its employees to upload sound recordings. *See United States v. Ionia Management S.A.*, 526 F. Supp. 2d 319, 324 (D. Conn. 2007) *aff’d* by 555 F.3d 303 (2d Cir. 2009) (“the fact that an agent’s act was illegal, contrary to his employer’s instructions, or against the corporation’s policies will not relieve the corporation of responsibility” if the act was otherwise committed in the course of employment.).

“complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” 129 S.Ct. 1937, 1949 (2009) (internal quotation omitted). The standard in *Iqbal* makes clear that it is the claim for relief—when considered in light of all of the allegations—that must be plausible, not any specific allegation itself.

Moreover, there is nothing remotely implausible about an allegation that Escape has encouraged its employees to upload sound recordings to the Grooveshark website. As Plaintiffs point out, and as Escape does not deny, access to infringing sound recordings is the lifeblood of Escape’s business, and, as Plaintiffs have clearly alleged, even Plaintiffs’ limited access to Escape’s own business records confirm the extraordinary amount of infringement committed by a small number of its employees.⁷ Am. Compl. at ¶¶ 5, 38.

At its essence, Escape’s motion for dismissal hinges on its claim that Plaintiffs cannot rely on an anonymous source without revealing “a description of the unnamed sources sufficient to allow the court to infer that the witnesses are likely to possess the information contained in the statements.” Def’s. Br. at 13. Once again, Defendants’ only support for this proposition are plainly inapplicable cases applying the heightened pleading requirements under Rule 9(b) and the federal securities laws. *See In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 442 (S.D.N.Y. 2005); *Amorosa v. Ernst & Young LLP*, 682 F. Supp. 2d 351, 360-61 (S.D.N.Y. 2010).

But the Supreme Court has clearly stated that only those specific causes of action addressed in Rule 9(b) are subject to the pleading requirements that Escape seeks to apply here.

⁷ Escape argues that the Employee Post is inherently implausible because, if true, one would expect far more than 100,000 uploads from Escape employees. Leaving aside audacity of Escape’s implicit argument that the illegal copying of over 100,000 sound recordings is somehow *de minimis*, this argument requires numerous inferences to be drawn in Defendants’ favor—such as the fact that the over 100,000 uploads Plaintiffs have identified so far are the only uploads that will be revealed in discovery—and is an argument for a jury, not a memorandum of law in support of a motion to dismiss. Indeed, since Plaintiffs filed the Amended Complaint, Escape produced additional employee information in the State Court action that reveals thousands of additional uploads unknown to the Plaintiffs at the time of the Amended Complaint.

See Leatherman, 507 U.S. at 168 ("[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions . . . *Expressio unius est exclusio alterius*."). Courts have specifically held that the particularity requirements of 9(b) do not apply in copyright cases. *Maverick Recording Co.*, 2006 U.S. Dist. LEXIS 52422, at *11-12; *see also Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir. 2004) ("with the exception of claims for fraud and mistake [] the sufficiency of a complaint is judged by the liberal system of notice pleading set up by the Federal Rules.") (internal quotation omitted); *cf. Franklin*, 763 F. Supp. at 4 (applying Rule 8 to copyright infringement action).

CONCLUSION

For the foregoing reasons, the Defendants' motion to dismiss the Amended Complaint for failure to state a claim must be denied.

DATED: New York, New York
March 14, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2012, a true and correct copy of the foregoing Plaintiffs' Memorandum of Law in Opposition to the Motion to Dismiss Filed by Defendants Escape Media Group Inc., Samuel Tarantino and Joshua Greenberg was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. I further sent unredacted copies of the foregoing via overnight delivery to:

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