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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILL LOOMIS,)	CV 12-5525 RSWL (JEMx)
)	
Plaintiff,)	ORDER Re: DEFENDANTS'
)	MOTION FOR SUMMARY
v.)	JUDGMENT [30]
)	
)	
JESSICA CORNISH P/K/A)	
JESSIE J; UMG RECORDINGS,)	
INC.; and UNIVERSAL)	
REPUBLIC RECORDINGS,)	
)	
Defendants.)	
)	
)	
)	
)	

23 Before the Court is Defendants Jessica Cornish
24 p/k/a Jessie J ("Cornish"), UMG Recordings, Inc.
25 ("UMG"), and Universal Republic Records' ("URR"),
26 Motion for Summary Judgment [30]. Defendants' Motion
27 was set for hearing on November 5, 2013 [30]. Having
28 reviewed all the papers and arguments submitted

1 pertaining to this Motion, **THE COURT NOW RULES AS**
2 **FOLLOWS:**

3 The Court hereby **GRANTS** Defendants' Motion for
4 Summary Judgment.

5 **I. BACKGROUND**

6 Plaintiff is a self-employed musician who has,
7 since 2007, been in a rock band called "Loomis & The
8 Lust." Defendants' Statement of Uncontroverted Facts
9 and Conclusions of Law in Support of Defendants' Motion
10 for Summary Judgment ("SUF") ¶¶ 1-2. In June or July
11 of 2008, Plaintiff wrote a composition entitled "Bright
12 Red Chords" ("BRC"). SUF ¶ 3. Plaintiff obtained a
13 copyright registration for BRC by depositing a CD
14 containing a recording of that composition (the
15 "Deposit Copy Recording"), as well as several other
16 recordings, with the United States Copyright Office.
17 Id. at ¶ 4. The U.S. Copyright Office gave the CD
18 containing the Deposit Copy Recording the registration
19 number PAU003479101, which is the only registered
20 copyright alleged to have been infringed in the
21 Complaint. Id. at ¶¶ 5-6. The Deposit Copy Recording,
22 recorded on August 4, 2008, was never commercially
23 released or exploited. Id. at ¶¶ 7, 12. Plaintiff
24 released CDs entitled "Nagasha" and "Space Camp," which
25 contained a recording of BRC. Id. at ¶ 8. "Nagasha"
26 was released in or about July 2009 and "Space Camp" in
27 or about 2010. Id. at ¶¶ 9-10. Plaintiff does not
28 know how many copies of "Nagasha" or "Space Camp" have

1 been sold. Id. at ¶¶ 24-25.

2 Defendant Cornish is a recording artist who is
3 signed to Defendant URR. Compl. ¶¶ 14, 17. Defendant
4 URR is owned by Defendant UMG. Id. at ¶ 18. In June
5 2011, Defendant Cornish, Lukasz Gottwald p/k/a "Dr.
6 Luke," Claude Kelly, Karl Martin Sandberg p/k/a "Max
7 Martin," and Henry Walter p/k/a "Cirkut" (collectively,
8 the "Domino Writers") wrote a composition entitled
9 "Domino". SUF ¶ 14. In or about June 2011, Gottwald
10 and Walter created an instrumental musical track which
11 became the instrumental musical bed for Domino. Id. at
12 ¶¶ 16-17. In June 2011, the melody and lyrics were
13 written and recorded at Conway Studios. Id. at ¶ 18.
14 Kelly and Cornish created the melody and lyrics for the
15 verses and choruses of Domino, in collaboration with
16 Gottwald over the instrumental musical bed. Id. at ¶
17 19. Walter was present during this session. Id. at ¶
18 20. Gottwald and Sandberg provided additional creative
19 contributions during the session. Id. at ¶ 21. At
20 this session, Cornish recorded her vocal performance of
21 the melody and lyrics that had been created at the
22 session. Id. at ¶ 22. After that session at Conway
23 Studios, Gottwald worked with Walter and Sandberg to
24 fine-tune and polish Domino. Id. at ¶ 23. Domino was
25 released by Defendant URR. Id. at ¶ 13.

26 Plaintiff has never met or spoken to any of the
27 Domino Writers. Id. at ¶ 43. Plaintiff has never
28 instructed anyone to send any music to any of the

1 Domino Writers. Id. at ¶ 45.

2 Plaintiff alleges that in August 2011, Defendants
3 infringed upon his copyright by producing and
4 distributing Domino. Compl. ¶ 19. Plaintiff alleges
5 that Domino contains substantially similar elements to
6 BRC. Id.

7 Plaintiff filed the Complaint on June 25, 2012 [1].
8 Defendants answered on August 20, 2012 [9, 11]. On
9 September 19, 2013, Defendants filed the instant Motion
10 for Summary Judgment [30].

11 **II. LEGAL STANDARD**

12 **A. Summary Judgment**

13 Summary judgment is appropriate when there is no
14 genuine issue of material fact and the moving party is
15 entitled to judgment as a matter of law. Fed. R. Civ.
16 P. 56(c). A fact is "material" for purposes of summary
17 judgment if it might affect the outcome of the suit,
18 and a "genuine issue" exists if the evidence is such
19 that a reasonable fact-finder could return a verdict
20 for the non-moving party. Anderson v. Liberty Lobby,
21 Inc., 477 U.S. 242, 248 (1986). The evidence, and any
22 inferences based on underlying facts, must be viewed in
23 the light most favorable to the opposing party.
24 Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d
25 1327, 1329 (9th Cir. 1983).

26 Where the moving party does not have the burden of
27 proof at trial on a dispositive issue, the moving party
28 may meet its burden for summary judgment by showing an

1 "absence of evidence" to support the non-moving party's
2 case. Celotex v. Catrett, 477 U.S. 317, 325 (1986).

3 The non-moving party, on the other hand, is
4 required by Fed. R. Civ. P. 56(c) to go beyond the
5 pleadings and designate specific facts showing that
6 there is a genuine issue for trial. Id. at 324.
7 Conclusory allegations unsupported by factual
8 allegations are insufficient to create a triable issue
9 of fact so as to preclude summary judgment. Hansen v.
10 United States, 7 F.3d 137, 138 (9th Cir. 1993). A non-
11 moving party who has the burden of proof at trial must
12 present enough evidence that a "fair-minded jury could
13 return a verdict for the [non-moving party] on the
14 evidence presented." Anderson, 477 U.S. at 255. Where
15 a motion for summary judgment is grounded on the
16 assertion that the non-moving party has no evidence,
17 the non-moving party may defeat the motion by "calling
18 the Court's attention to supporting evidence already in
19 the record that was overlooked or ignored by the moving
20 party." Celotex, 477 U.S. at 332.

21 Conclusory, speculative testimony in affidavits and
22 moving papers is insufficient to raise genuine issues
23 of fact and defeat summary judgment. See Falls
24 Riverway Realty, Inc. v. Niagara Falls, 754 F.2d 49 (2d
25 Cir. 1985); Thornhill Pub. Co., Inc. v. GTE Corp., 594
26 F.2d 730, 738 (9th Cir. 1979). The party who will have
27 the burden of proof must persuade the Court that it
28 will have sufficient admissible evidence to justify

1 going to trial. Notmeyer v. Stryker Corp., 502 F.
2 Supp. 2d 1051, 1054 (N.D. Cal. 2007).

3 In ruling on a motion for summary judgment, the
4 Court's function is not to weigh the evidence, but only
5 to determine if a genuine issue of material fact
6 exists. Anderson, 477 U.S. at 255.

7 **B. Copyright Infringement**

8 To establish copyright infringement, two elements
9 must be proven: 1) ownership of a valid copyright; and
10 2) copying of protected elements of the plaintiff's
11 work. See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.,
12 499 U.S. 340, 361 (1991); Benay v. Warner Bros. Entm't,
13 Inc., 607 F.3d 620, 624 (9th Cir. 2010).

14 "Absent evidence of direct copying, proof of
15 infringement involves fact-based showings that the
16 defendant had access to the plaintiff's work and that
17 the two works are substantially similar." Funky Films,
18 Inc. v. Time Warner Entm't Co., 462 F.3d 1072, 1076
19 (9th Cir. 2006).

20 A plaintiff satisfies the access element by showing
21 that a defendant had "an opportunity to view or to copy
22 plaintiff's work." Three Boys Music Corp. v. Bolton,
23 212 F.3d 477, 482 (9th Cir. 2000) (citing Sid and Marty
24 Krofft Television Prods., Inc. v. McDonald's Corp., 562
25 F.2d 1157, 1172 (9th Cir. 1977)). Where a high degree
26 of access is shown, a lower standard of proof of
27 substantial similarity may be required. Swirsky v.
28 Carey, 376 F.3d 841, 844 (9th Cir. 2004). This is

1 known as the "inverse ratio rule." Benay, 607 F.3d at
2 625; Rice v. Fox Broad. Co., 330 F.3d 1170, 1178 (9th
3 Cir. 2003); Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th
4 Cir. 1990). Generally speaking, "[w]here there is no
5 direct evidence of access, circumstantial evidence can
6 be used to prove access either by (1) establishing a
7 chain of events linking the plaintiff's work and the
8 defendant's access, or (2) showing that the plaintiff's
9 work has been widely disseminated." Art Attacks Ink,
10 LLC v. MGA Entm't Inc., 581 F.3d 1138, 1143 (9th Cir.
11 2009); see also Three Boys Music Corp., 212 F.3d at
12 482.

13 "When the issue is whether two works are
14 substantially similar, summary judgment is appropriate
15 'if no reasonable juror could find substantial
16 similarity of ideas and expression, viewing the
17 evidence in the light most favorable to the nonmoving
18 party.'" Smith v. Jackson, 84 F.3d 1213, 1218 (9th
19 Cir. 1996) (quoting Kouf v. Walt Disney Pictures &
20 Television, 16 F.3d 1042, 1045 (9th Cir. 1994)).

21 A two-part test is used to determine whether the
22 two works are substantially similar: an "intrinsic" and
23 "extrinsic" part. Benay, 607 F.3d at 624. "The
24 extrinsic test considers whether two works share a
25 similarity of ideas and expression as measured by
26 external, objective criteria." Swirsky, 376 F.3d at
27 845 (quoting Smith, 84 F.3d at 1218). In analyzing
28 whether the two works are substantially similar, the

1 court must distinguish between the protectable and
2 unprotectable material because a party claiming
3 infringement may place no reliance upon any similarity
4 in expression resulting from unprotected elements. See
5 Funky Films, 462 F.3d at 1077; Swirsky, 376 F.3d at
6 845; Apple v. Microsoft, 35 F.3d 1435, 1442-43 (9th
7 Cir. 1994).

8 "The 'intrinsic test' is a subjective comparison
9 that focuses on 'whether the ordinary, reasonable
10 audience' would find the works substantially similar in
11 the 'total concept and feel of the works.'" Benay, 607
12 F.3d at 624 (quoting Cavalier v. Random House, Inc.,
13 297 F.3d 815, 822 (9th Cir. 2002)). "Once the
14 extrinsic test is satisfied, the fact finder applies
15 the intrinsic test." Three Boys Music Corp., 212 F.3d
16 at 485.

17 Generally, "only the 'extrinsic' test is . . .
18 employed at summary judgment, as the 'intrinsic' test
19 should generally be reserved for the ultimate finder of
20 fact." Idema v. Dreamworks, Inc., 162 F. Supp. 2d
21 1129, 1177 (C.D. Cal. 2001); see also Benay, 607 F.3d
22 at 624; Funky Films, 462 F.3d at 1077. If a court
23 concludes that "reasonable minds might differ as to
24 whether there is substantial similarity between the
25 protected expression of ideas in two literary works,
26 and the record supports the district court's
27 conclusion, there is a triable issue of fact that
28 precludes summary judgment." Shaw, 919 F.2d at 1361.

1 462 F.3d at 1076.

2 **A. Access**

3 Plaintiff does not claim to have any evidence of
4 direct copying. See Opp'n 9:6. As such, Plaintiff
5 must first establish that Defendant Cornish or the
6 other Domino Writers had access to BRC. To prove
7 access, Plaintiff must show that Defendant Cornish or
8 the other Domino Writers had "an opportunity to view or
9 to copy [Plaintiff's] work." Three Boys Music Corp.,
10 212 F.3d at 482. The burden is on Plaintiff to "show a
11 reasonable possibility, not merely a bare possibility,
12 that an alleged infringer had the chance to view the
13 protected work." Art Attacks Ink, 581 F.3d at 1143
14 (citing Three Boys Music Corp., 212 F.3d at 481).
15 Moreover, "Plaintiff cannot create a triable issue of
16 access merely by showing 'bare corporate receipt' of
17 his work by an individual who shares a common employer
18 with the alleged copier." Gable v. NBC, 727 F. Supp.
19 2d 815, 826 (C.D. Cal. 2010) (citing Jorgensen v.
20 Epic/Sony Records, 351 F.3d 46, 52-53 (2d Cir. 2003);
21 Meta-Film Assocs., Inc. v. MCA, Inc., 586 F. Supp.
22 1346, 1357-58 (C.D. Cal. 1984)).

23 If "there is no direct evidence of access,
24 circumstantial evidence can be used to prove access
25 either by (1) establishing a chain of events linking
26 the plaintiff's work and the defendant's access, or (2)
27 showing that the plaintiff's work has been widely
28 disseminated." Id. Of course, Plaintiff's evidence of

1 such access must be "substantial, affirmative and
2 probative." Jorgensen, 351 F.3d at 51 (citing Scott v.
3 Paramount Pictures Corp., 449 F. Supp. 518, 520 (D.D.C.
4 1978)).

5 1. Chain of Events

6 Plaintiff argues several chains of events to show
7 that Defendant Cornish had access to BRC prior to
8 creating Domino. These theories of access may be
9 divided into those involving purported UMG employees
10 and those involving non-employees.

11 a. *UMG Employees*

12 Plaintiff presents five UMG employees as "chain of
13 events" conduits to prove access: Nate Albert, Sylvia
14 Baker, Josh Feldman, Sunny Elle Lee, and Mark Czarra.
15 SDMF ¶¶ 50, 59, 68, 79; Opp'n 7:19-22. Plaintiff
16 argues that because each of these UMG employees had a
17 copy of BRC, the Domino Writers had sufficient access
18 to BRC. The crux of Plaintiff's argument is that
19 because these five UMG employees were high ranking
20 executives, they exerted such control over their roster
21 of artists that the Domino Writers likely would have
22 received BRC. Opp'n 13:1-22.

23 The critical question here is whether Plaintiff
24 submitted BRC "to an intermediary who is in a position
25 to transmit [Plaintiff's] work to the creators of the
26 infringing work." Gable, 727 F. Supp. 2d at 826
27 (citing Meta-Film, 586 F. Supp. at 1355-56). Such an
28 intermediary "can be a person who (1) has supervisory

1 responsibility for the *allegedly infringing project*,
2 (2) contributed ideas and materials to it, or (3)
3 *worked in the same unit* as the creators." Id.
4 (emphasis added). "At a minimum, however, 'the
5 dealings between the plaintiff and the intermediary and
6 between the intermediary and the alleged copier must
7 involve some overlap in subject matter to permit an
8 inference of access.'" Id. (quoting Meta-Film, 586 F.
9 Supp. at 1358).

10 It appears to this Court that Plaintiff must fairly
11 trace, through a chain of events, a link between the
12 alleged intermediary and the Domino Writers, the
13 creators of the allegedly infringing work.

14 For example, in Bernal v. Paradigm Talent &
15 Literary Agency, the court held that the plaintiff had
16 not "presented more than a scintilla of evidence to
17 support her theory that [d]efendants had a reasonable
18 possibility of access" to the allegedly infringed work.
19 788 F. Supp. 2d 1043, 1058 (C.D. Cal. 2010). In that
20 case, the plaintiff submitted the allegedly infringed
21 work, *Homeless*, to a talent agent, Ruf, at the same
22 talent agency, Paradigm, as that which represented the
23 creator of the allegedly infringing work, *Desperate*
24 *Housewives*. Id. at 1049. Another agent at Paradigm,
25 Patman, represented the creator of *Desperate*
26 *Housewives*, *Cherry*. Id. Plaintiff theorized, then,
27 that Ruf could have given *Homeless* to Patman, who
28 assisted *Cherry* in the development of *Desperate*

1 Housewives. Id. at 1054. It was undisputed that Ruf
2 and Patman had worked in the same agency, office, and
3 floor as each other, and that they had never worked on
4 any projects together. Id. at 1058. Both Ruf and
5 Patman testified that they had not passed along any
6 screenplay written by anyone else to another writer
7 represented by Paradigm. Id. The court found that
8 "the only reasonable inference from the record is that
9 Ruf and Patman are the type of distant colleagues who
10 occasionally engaged in idle chit-chat while riding the
11 elevator together or attending an office holiday party.
12 In short, they simply worked for the same company."
13 Id. This, the court found, was not enough to raise a
14 triable issue of fact regarding access. Id.

15 Similarly, in Jones v. Blige, the Sixth Circuit
16 affirmed a grant of summary judgment, finding that
17 plaintiffs had not presented any evidence supporting
18 their theory of the defendant-creators' access to the
19 allegedly infringed work. 558 F.3d 485, 493 (6th Cir.
20 2009). In that case, plaintiffs delivered a demo CD
21 containing the allegedly infringed work, "Party Ain't
22 Crunk," to McKaie, a Senior Vice President of Artists &
23 Repertoire ("A&R") at a division of Universal Music
24 Group Recordings, Inc. Id. at 488-89. This was done
25 after McKaie told one of the plaintiffs to send the
26 demo CD in. Id. at 488. McKaie, through his secretary
27 JoAnn Frederick, ultimately returned the demo CD to
28 plaintiffs. Id. at 489. Plaintiffs claimed that a

1 song by defendant Blige, "Family Affair," released
2 several months after plaintiffs had submitted "Party
3 Ain't Crunk" to McKaie, infringed on "Party Ain't
4 Crunk." Id. at 488-89. The court found that the
5 plaintiffs' various asserted connections between McKaie
6 and the defendants was unsupported by the record. Id.
7 at 491. In particular, plaintiffs, without support,
8 asserted that McKaie acted as a liaison between
9 departments, that he was in a position to provide
10 suggestions or comments to the creators of "Family
11 Affair," and that McKaie knew of Blige's album because
12 one of the other songs on Blige's album had a sample of
13 a television theme-song. Id. at 491-92. The court
14 rejected such theories, finding no evidence supporting
15 plaintiffs' theories. Id. at 492. Instead, the sole
16 connection between McKaie and Blige was that Blige had
17 a recording contract with Universal. Id. at 491. As
18 such, the Sixth Circuit affirmed the district court's
19 holding that plaintiffs had not established access.
20 Id. at 493.

21 The Court finds that Plaintiff's theories of access
22 through the UMG employees here are equally, if not
23 more, attenuated and speculative as those in Bernal and
24 Jones.

25 Plaintiff's primary argument regarding "chain of
26 events" access is that the Domino Writers must have
27 received BRC because of the enormous amount of control
28 UMG exerts over its artists. Opp'n 13:10-15.

1 Plaintiff presents several facts to show corporate
2 control: (1) testimony that Defendant Cornish
3 apparently did not know two of the four other writers
4 on Domino (SDMF ¶ 14; Supp. Movit Decl. Ex. 15 [Cornish
5 Depo. 18:9-13]); (2) testimony that while Defendant
6 Cornish approves all remixes of her songs she did not
7 recall a particular remix (Pease Decl. Ex. E [Cornish
8 Depo. 34:16-20; 35:1-16]); and (3) testimony from
9 Defendant Cornish that a song she co-wrote, "Party in
10 the U.S.A.," was pitched by numerous persons to other
11 recording artists and was ultimately recorded by Miley
12 Cyrus (Pease Decl. Ex. E [Cornish Depo 60:11-61:5]).
13 Yet beyond arguing that UMG exerts such control over
14 its artists, Plaintiff does not argue how a UMG
15 employee's receipt of BRC would put that intermediary
16 "in a position to transmit" BRC to the Domino Writers.
17 Gable, 727 F. Supp. 2d at 826. In other words,
18 Plaintiff fails to even attempt to trace Albert,
19 Feldman, Baker, Lee, or Czarra's receipt of BRC to any
20 of the Domino Writers in any meaningful way.

21 Without a showing as to how the Domino Writers and
22 these alleged intermediaries' paths crossed, the Court
23 finds that Plaintiff has not presented any evidence
24 showing that "the dealings between the plaintiff and
25 the intermediary and between the intermediary and the
26 alleged copier [] involve[s] some overlap in subject
27 matter to permit an inference of access." Meta-Film,
28 586 F. Supp. at 1358.

1 Plaintiff has not shown any overlap beyond the fact
2 that these individuals happened to be employed by
3 Defendant UMG at the same time Defendant Cornish
4 created Domino. Plaintiff's theories of access are
5 essentially analogous to the plaintiff's theory in
6 Jones wherein the only link between intermediary and
7 alleged infringer was a thin, tenuous, corporate
8 connection.

9 Notwithstanding the failure of Plaintiff's
10 "corporate control" theory of access, the Court still
11 proceeds to analyze Plaintiff's purported UMG employee-
12 intermediaries.

13 Plaintiff first asserts that Nate Albert, a Senior
14 Vice President, A&R for Defendant URR, served as an
15 intermediary as he was in a position to supervise and
16 control Defendant Cornish so as to transmit BRC to the
17 Domino Writers. Opp'n 13:1-8. Plaintiff stresses the
18 importance of the A&R department at Defendant UMG. As
19 far as this Court can determine, the A&R department's
20 functions are: (1) to discover and recruit new artists;
21 (2) to work with artists on their sound recordings; (3)
22 to deliver master recordings to the label for release;
23 and (4) to work with the label's sales, marketing, and
24 other departments to maximize artists' recording sales.
25 Mackay Decl. ¶ 3. Plaintiff produces the declaration
26 of Brandon Mason to show that Albert listened to a
27 recording of BRC in Mason's presence on June 8, 2009
28 and was given a CD of BRC at the end of the meeting.

1 Mason Decl. ¶ 2. Although Plaintiff has produced
2 evidence showing that Albert received a copy of BRC,
3 crucially, Plaintiff has *not* produced any logical chain
4 of events tying Albert to any of the Domino Writers.¹
5 Even construing all inferences in favor of Plaintiff,
6 Plaintiff has failed to show a connection between
7 *Albert* and any of the Domino Writers or the Domino
8 project. Even if Albert did have supervisory,
9 creative, or business control over Defendants UMG or
10 URR's artists as a Senior Vice President, A&R,
11 Plaintiff has *not* presented any evidence implying that
12 Albert had such control over any of the Domino Writers
13 or interaction with such individuals who did have such
14 control.

15 In fact, Albert has declared that he has never met
16 any of the Domino Writers, has never provided anything
17 to said writers, and has no role or responsibility -
18 supervisory, creative, business, or otherwise - over
19 Defendant Cornish's music. Albert Decl. ¶¶ 3-6.
20 Albert has also declared that he has never played,
21 performed, or provided a copy of BRC to anyone in the
22 world. *Id.* at ¶ 7. Plaintiff fails to produce any
23

24
25 ¹ Plaintiff cites to the Mason Declaration to
26 dispute Defendants' assertions that Albert has never
27 met or provided material to any of the Domino Writers.
28 The Mason Declaration merely states that Mason provided
Albert with a copy of BRC. It does nothing to show how
Albert could have gone on to provide BRC to any of the
Domino Writers.

1 evidence to the contrary. In light of Albert's
2 denials, the Court finds that Plaintiff has failed to
3 show access through Albert. See Tomasini v. Walt
4 Disney Co., 84 F. Supp. 2d 516, 520 (S.D.N.Y. 2000)
5 (finding that testimony by intermediary disclaiming any
6 distribution of the allegedly infringed property to any
7 at any time weighed against a finding of access). In
8 any event, the Court further finds that Plaintiff has
9 not presented any evidence showing any dealings between
10 Albert and the Domino Writers, much less any overlap in
11 subject matter. Accordingly, the Court finds that
12 Plaintiff has failed to show a chain of events
13 evidencing access through Albert.

14 Plaintiff cites to the same evidence to create an
15 issue of material fact as to the Domino Writers' access
16 through Sylvia Baker, Josh Feldman, and Sunny Elle Lee.
17 SDMF ¶¶ 39, 61, 72, 81, 84. In particular, Plaintiff
18 cites to: (1) an email chain between Lee and Kristin
19 Loomis in which Kristin Loomis purportedly sent Lee an
20 mp3 copy of BRC (Loomis Decl. Ex. C [Will Loomis Depo.
21 Ex. 18]); (2) deposition testimony of Plaintiff
22 speculating that Lee may have shown BRC to Sylvia
23 Rhone, who may have been Lee's boss at the time (Pease
24 Decl. Ex. G [Will Loomis Depo. Vol. 3 385:12-24]); and
25 (3) deposition testimony of Plaintiff that the last
26 time he spoke with Josh Feldman was March 4, 2009
27 wherein Feldman indicated he would check back in with
28 Plaintiff in a year but that Lee was the one who

1 checked up with Plaintiff (Pease Decl. Ex. G [Will
2 Loomis Depo. Vol. 3 456:6-10]). As a threshold matter,
3 it is not apparent how any of these facts connects any
4 of these three purported conduits to any of the Domino
5 Writers beyond suggesting that Lee and Feldman may have
6 obtained copies of BRC.

7 Plaintiff asserts that Sylvia Baker, a specialist
8 in the Shared Services Department of the Copyright and
9 Royalties Division of Defendant UMG, could serve as an
10 intermediary. SDMF ¶ 59; Baker Decl. ¶ 1. It is not
11 entirely clear on the record how Baker received a copy
12 of BRC. Plaintiff does not argue any theory on how
13 Baker could have served as an access point for any of
14 the Domino Writers. Moreover, Plaintiff has not
15 presented any evidence to rebut Baker's myriad
16 declarations denying any connection with Defendant
17 Cornish and the other Domino Writers. Baker Decl. ¶¶
18 4-7; SDMF ¶¶ 62, 64-67. It appears that Plaintiff's
19 sole theory regarding the Domino Writers' access to BRC
20 through Baker lies in the same vein as his theory of
21 access through Albert. Yet, Plaintiff does not dispute
22 that Baker's job responsibilities involve processing
23 mechanical licenses for various writers, not finding
24 new artists, selecting creative material for roster
25 artists, or deciding which recordings will be released
26 by UMG. SDMF ¶ 63. In short, Plaintiff has not
27 presented any evidence connecting Baker with the Domino
28 Writers, other than the mere fact that she works for

1 Defendant UMG. The Court hereby finds that this is not
2 enough to create a triable issue of material fact as to
3 access through Baker.

4 Plaintiff also asserts a theory that Josh Feldman,
5 a former UMG employee, could have provided the Domino
6 Writers with access to BRC. SDMF ¶ 68. Plaintiff
7 testified in his deposition that Feldman "is a
8 Universal A&R rep that came to see" Plaintiff's band's
9 show in March 2009. Movit Decl. Ex. 10 [Will Loomis
10 Depo. Vol. 3, 454:21-23]. But beyond this, it is not
11 clear how Feldman could have crossed paths with any of
12 the Domino Writers. It is undisputed that while
13 Feldman worked for UMG, he was assigned to Cherry
14 Entertainment, an entity signed to a separate label
15 deal with UMG. SDMF ¶ 73. While there, Feldman
16 reported directly to Jolene Cherry in Santa Monica,
17 California. SDMF ¶ 74. Plaintiff concedes that the
18 Domino Writers have never met or received anything from
19 Feldman, and that Feldman had no role or responsibility
20 with regard to Defendant Cornish's music or recordings.
21 SDMF ¶¶ 70-71. Beyond merely theorizing that Feldman's
22 receipt of BRC must be imputed to the Domino Writers,
23 Plaintiff provides no evidence actually substantiating
24 any connection between Feldman and the Domino Writers.
25 As such, the Court finds that there Plaintiff has not
26 presented any evidence creating a triable issue of
27 material fact as to the Domino Writers' access to BRC
28 through Feldman.

1 Plaintiff's also identifies Sunny Elle Lee as a
2 possible intermediary.² SDMF ¶ 79. Plaintiff does
3 present evidence showing that Lee received a copy of
4 BRC from Kristin Loomis - an email chain between Lee
5 and Kristin Loomis wherein Lee requests an mp3 of BRC.
6 Loomis Decl. Ex. C [Will Loomis Depo. Ex. 18].
7 Plaintiff surmises that Lee could have provided a copy
8 of BRC to Sylvia Rhone, who was apparently Lee's boss
9 at Universal Motown.³ Pease Decl. Ex. G [Will Loomis
10 Depo. Vol. 3 385:12-24]. Yet Plaintiff provides no
11 explanation of Lee's dealings - or Rhone's dealings -
12 with the Domino Writers or the Domino project
13 sufficient "to permit an inference of access." Meta-
14 Film, 586 F. Supp. at 1358. Even accepting Plaintiff's
15 contention that A&R representatives play significant
16 roles in the selection of music for artists on
17 Defendants UMG and URR's rosters, Plaintiff has failed
18 to assert how, when, or in what way Lee could have
19 crossed paths with any of the Domino Writers or even
20 anyone who interacted with the Domino Writers or the
21 Domino project. If the court in Bernal held that the
22 plaintiff failed to show access even when that

23 _____

24 ² While Plaintiff suggested that Lee was an
25 executive at Defendant UMG in oral argument, he has not
26 presented any evidence showing that she was a UMG or
27 URR executive at any time.

28 ³ There is no evidence in the record detailing
whether Universal Motown is a separate entity from
Defendants UMG and URR.

1 plaintiff had shown that the intermediary worked in the
2 same office, on the same floor as an individual who
3 creatively influenced the allegedly infringing work,
4 this Court, *a fortiori*, cannot find a triable issue of
5 access where Plaintiff has failed to identify even one
6 person connected to both Lee and to any of the Domino
7 Writers and the Domino project. In short, the Court
8 finds that Plaintiff has failed to produce sufficient
9 evidence to create a triable issue of access through
10 Lee.

11 Plaintiff also appears to identify Mark Czarra as a
12 possible intermediary. While Plaintiff includes
13 Czarra's declaration in his Opposition, he does not
14 provide any argument in support of his theory of access
15 through Czarra.⁴ Plaintiff presents evidence that
16 Czarra worked as a Vice President of Promotion at
17 Defendant UMG from February 2005 to June 2009. Czarra
18 Decl. ¶ 5. Plaintiff also presents evidence that
19 Czarra worked with Plaintiff's band to get them more
20 radio airplay in "the summer of 2009" and in 2010. *Id.*
21 at ¶¶ 3-4. In other words, construing all inferences
22 in Plaintiff's favor, Plaintiff has presented evidence
23 that Czarra was in possession of BRC while he was
24 working at Defendant UMG. But Plaintiff's theory of

25
26 ⁴ At this juncture, because the Court finds that
27 Plaintiff has failed to show access through Czarra, the
28 Court need not decide whether the Czarra Declaration is
precluded for Plaintiff's failure to identify Czarra as
a potential witness in discovery.

1 access through Czarra suffers from the same defects as
2 his theories of access through Albert, Baker, Feldman,
3 and Lee: Plaintiff has failed to identify how Czarra is
4 connected to any of the Domino Writers or to any
5 individual connected to both Czarra and any of the
6 Domino Writers or the Domino project. Plaintiff must
7 show some "overlap in subject matter" between Czarra
8 and the Domino Writers for there to be an inference of
9 access. Gable, 727 F. Supp. 2d at 826. Plaintiff has
10 failed to do so here. Thus, the Court finds that
11 Plaintiff has failed to provide sufficient evidence of
12 access through Czarra.

13 b. *Non-UMG Employees*

14 Plaintiff provides two more "chain of events"
15 theories of access: (1) through Casey Hooper and (2)
16 through Rodney Jerkins. SDMF ¶¶ 85, 105.

17 Plaintiff argues that Casey Hooper, Plaintiff's
18 former guitar player, could serve as an intermediary
19 for Sandberg and Gottwald's access to BRC. Pease Decl.
20 Ex. G [Will Loomis Depo. Vol. 3, 376:18-24. In
21 particular, Plaintiff testified that Hooper was a
22 writer on the Katy Perry movie "Part of Me." Id.
23 Furthermore, Plaintiff asserts that Sandberg and
24 Gottwald were coproducers of "Part of Me." Id.
25 Plaintiff does not present any other evidence of any
26 interactions between Gottwald or Sandberg and Hooper.
27 But more to the point, Plaintiff has not produced any
28 evidence as to the respective roles and

1 responsibilities of Hooper, Sandberg, and Gottwald with
2 respect "Part of Me." Plaintiff has not presented any
3 evidence showing how or in what manner Hooper's role
4 overlapped with Sandberg and Gottwald's roles. The
5 Court finds that this is insufficient to raise a
6 triable issue of material fact regarding access.

7 Finally, Plaintiff argues that Rodney Jerkins could
8 have provided access to BRC to the Domino Writers.
9 SDMF ¶ 105. Plaintiff testified that he provided
10 Jerkins a copy of BRC through the New Music Seminar on
11 February 2, 2010. Pease Decl. Ex. F [Will Loomis Depo.
12 Vol. 2 327:23-328:23]. Plaintiff also testifies that
13 Jerkins frequently works with three of the Domino
14 Writers: Kelly, Gottwald, and Sandberg. Pease Decl.
15 Ex. F. [Will Loomis Depo. 328:10-12]. Plaintiff's
16 assertion is based upon information he purported to
17 have seen on the Internet. Supp. Movit Decl. Ex. 13
18 [Will Loomis Depo. Vol. 3, 500:10-24; 502:10-23].
19 Plaintiff provides no other evidence tying Jerkins to
20 any of the Domino Writers. It is well established that
21 "conclusory or speculative testimony is insufficient to
22 raise a genuine issue of material fact to defeat
23 summary judgment." Anheuser-Busch, Inc. v. Natural
24 Beverage Distribs., 69 F.3d 337, 345 (9th Cir. 1995).
25 Moreover, it is also well established that a district
26 court need not find a genuine issue of fact if it is
27 based on "'uncorroborated and self-serving' testimony."
28 F.T.C. v. Neovi, Inc., 604 F.3d 1150, 1159 (9th Cir.

1 2010); see also Villiarimo v. Aloha Island Air, Inc.,
2 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting Kennedy v.
3 Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996)).
4 Such is the case here. Plaintiff provides no evidence,
5 beyond Plaintiff's bald assertions, made without
6 personal knowledge, that Jerkins actually worked with
7 any of the Domino Writers. Accordingly, the Court
8 finds that Plaintiff has failed to show access through
9 Ronald Jerkins.

10 c. *Conclusion*

11 The Court finds that Plaintiff has failed to
12 provide any evidence to support any of its purported
13 "chain of events" theories of access.

14 2. Widespread Dissemination

15 "Where there is no direct evidence of access" and
16 Plaintiff cannot show access through "a chain of events
17 linking plaintiff's work and the defendant's access,"
18 plaintiff may still show access by "showing that the
19 plaintiff's work has been widely disseminated." Art
20 Attacks Ink, 581 F.3d at 1143. It appears, however,
21 that "the public dissemination necessary to infer that
22 a defendant might have had access to the work is
23 considerable." McRae v. Smith, 968 F. Supp. 559, 564
24 (D. Colo. 1997) (citing Selle v. Gibb, 741 F.2d 896,
25 901 (7th Cir. 1984)). As a general matter, it appears
26 that in order for a work to be widely disseminated, it
27 must achieve a high degree of commercial success or be
28 readily available in the relevant market. See Art

1 Attacks Ink, 581 F.3d at 1144 (finding T-shirt design
2 was not widely disseminated where plaintiff sold 2,000
3 shirts a year, displayed the design at fair booths and
4 store kiosks, and posted the designs on the Internet);
5 Rice, 330 F.3d at 1178 (finding insufficient evidence
6 of widespread dissemination where plaintiff sold 17,000
7 copies of a video over a 13 year period); ABKCO Music,
8 Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir.
9 1983) (access found where song was number one on the
10 popular music charts for weeks in the United States and
11 England); Jane Russell Designs, Inc. v. Mendelson &
12 Assocs., Inc., 114 F. Supp. 2d 856, 864 (D. Minn. 2000)
13 (finding access where product was nationally sold,
14 generated substantial revenue, and was nationally
15 advertised to the public); Jane v. Fonda, 526 F. Supp.
16 774, 776 (C.D. Cal. 1981) (book sales of no more than
17 2,000 copies nationwide and no more than 700 copies in
18 Southern California did not create more than a bare
19 possibility of access).

20 The Court finds that Plaintiff's evidence falls far
21 short of this standard.

22 Plaintiff here has provided evidence of 46 total
23 sales of BRC. Pease Decl. Ex. B [Kristin Loomis Depo.
24 Ex. 41].

25 Additionally, Plaintiff has provided a voluminous
26 amount of "Jerome Promotions [sic] Playlists," "Spins
27 Tracking Systems STSs," "radio reports," and "video
28 airplay reports" to this Court without any explanation

1 or context. Pease Decl. Ex. B. [Kristin Loomis Depo.
2 Exs. 14-25, 27-32]. To the extent these are offered to
3 prove the truth of the statements set forth in them -
4 namely that BRC was actually played on these radio
5 stations or television stations - they are hearsay as
6 they are out of court statements offered to prove their
7 truth. Fed. R. Evid. 801(c). These reports are
8 inadmissible hearsay unless they qualify as either non-
9 hearsay or fall within a hearsay exception. Fed. R.
10 Evid. 802. Inadmissible hearsay, of course, cannot be
11 considered on a motion for summary judgment. Anheuser-
12 Busch, 69 F.3d at 345 n.4. Here, these reports do not
13 qualify for any exception to the rule against hearsay.
14 Despite Plaintiff's attempts to show otherwise (See
15 Loomis Decl. ¶ 7), these reports do not qualify under
16 the business records exception under Federal Rule of
17 Evidence 803(6). Under that exception, "[a] record of
18 an act, condition, opinion, or diagnosis" may be
19 excepted from the rule against hearsay if: (1) "the
20 record was made at or near the time by-or from
21 information transmitted by-someone with knowledge;" (2)
22 the record was kept in the course of a regularly
23 conducted activity; (3) making the record was a regular
24 practice of that activity; (4) these conditions are
25 shown by "the testimony of the custodian or another
26 qualified witness;" and (5) "neither the source of
27 information nor the method or circumstances of
28 preparation indicate a lack of trustworthiness." Fed.

1 R. Evid. 803(6); Paddack v. Dave Christensen, Inc., 745
2 F.2d 1254, 1258 (9th Cir. 1984). In particular, to
3 meet the knowledge requirement, the source of the
4 information in the record must be identified. Scheerer
5 v. Hardee's Food Sys., 92 F.3d 702, 706 (8th Cir. 1996)
6 (holding that an "incident report was not admissible as
7 a business record under Fed. R. Evid. 803(6) because
8 the source of the information contained therein was
9 never identified at trial"). It is not apparent to the
10 Court who created these reports, how they were created,
11 or from what information or methodology these reports
12 were compiled. Accordingly, the Court finds the
13 reports constitute inadmissible hearsay.

14 Plaintiff further produces evidence that Plaintiff
15 and Kristin Loomis heard BRC over the radio in Santa
16 Barbara between four to six times. SDMF ¶¶ 35-38.
17 Plaintiff also presents evidence that he viewed a
18 television broadcast of BRC on MTVu, a station shown on
19 college campuses. SDMF ¶ 29. Such evidence is
20 insufficient to raise a triable issue of material fact
21 as to widespread dissemination - "evidence of 'small
22 circulation . . . or local air time' without other
23 proof of access is generally not enough to demonstrate
24 a reasonable possibility of access." Feldman v.
25 Twentieth Century Fox Film Corp., 723 F. Supp. 2d 357,
26 365 (D. Mass. 2010) (citing 4 Nimmer on Copyright §
27 13.02[A]).

28 Plaintiff similarly seeks to show widespread

1 dissemination by arguing that various retailers and
2 airlines played BRC. Opp'n 14:24-27; SDMF ¶¶ 31, 33.
3 The evidence Plaintiff produces to support these
4 theories amounts to: (1) a Loomis & the Lust "e-blast"
5 where the author states that BRC "is being featured on
6 the Urban Outfitters sampler;" (2) an email chain
7 between Kristin Loomis and two other individuals
8 discussing spending an additional \$2,000 to be included
9 in an Urban Outfitters sampler; (3) an email from DMX,
10 Inc. to Loomis & the Lust stating that DMX's client,
11 Abercrombie & Fitch, "wishes to play your release
12 *Bright Red Colors [sic] by Loomis and the Lust* within
13 their shops and worldwide (1,200 locations);" (4) an
14 email from Loomis & the Lust to "HIP Video Promo"
15 detailing Loomis & the Lust's apparent media exposure;
16 and (5) Andy Gesner's declaration that the music video
17 for BRC was played in retailers including Harley
18 Davidson, Footlocker, Champs, and Foot Reaction. Pease
19 Decl. Ex. B. [Kristin Loomis Decl. Exs. 34-35, 37-38];
20 Gesner Decl. ¶ 10. As a preliminary matter, the emails
21 Plaintiff cites to regarding the Urban Outfitters and
22 Continental and Delta Airlines promotions are out-of-
23 court statements and thus hearsay to the extent they
24 are offered for their truth. As a result, this Court
25 need not consider them in determining whether Plaintiff
26 has presented a triable issue of material fact. See
27 Anheuser-Busch, 69 F.3d at 345 n.4. But even assuming,
28 *arguendo*, that this evidence were admissible, Plaintiff

1 has not shown whether any of these retailers actually
2 went forward with these promotions, how many stores
3 these retailers played BRC in, or how many samplers
4 containing BRC were given away. Moreover, Plaintiff
5 must not only show that BRC was actually played in
6 these retail outlets, but also that "significant
7 numbers of passerby would notice" BRC. Art Attacks
8 Ink, 581 F.3d at 1144. The Court therefore finds that
9 such evidence is insufficient to show widespread
10 dissemination.

11 Plaintiff raises two other potential theories of
12 widespread dissemination. First, Plaintiff appears to
13 contend that BRC achieved widespread dissemination
14 through his live performances. Opp'n 11:8. However,
15 Plaintiff has not produced any evidence, such as the
16 scope, extent, attendance levels, locations, or number
17 of performances of BRC, regarding his live
18 performances. In any event, Plaintiff does not dispute
19 that he has no reason to believe that any of the Domino
20 Writers ever attended any performance of BRC. SDMF ¶
21 46. Thus, Plaintiff has failed to present a triable
22 issue of material fact as to widespread dissemination
23 through live performances. See McRae, 968 F. Supp. at
24 565 (where defendant composers did not attend live
25 performances of the allegedly infringed song, there was
26 no evidence of national airplay, and no evidence of
27 nationwide dissemination, court held availability of
28 the song was even less than virtually de minimis).

1 Second, Plaintiff appears to contend that BRC achieved
2 widespread dissemination through its availability on
3 the Internet. Opp'n 11:7. The availability of a
4 copyrighted work on the Internet, in and of itself, is
5 insufficient to show access through widespread
6 dissemination. See Art Attacks Ink, 581 F.3d at 1145.
7 As such, the Court finds that these arguments fail to
8 show a triable issue of material fact regarding
9 widespread dissemination.

10 3. Striking Similarity

11 One alternative to establishing access through a
12 chain of events or widespread dissemination is showing
13 a "striking similarity" between the works at issue.
14 See Smith, 84 F.3d at 1220; Bouchat v. Baltimore
15 Ravens, Inc., 241 F.3d 350, 356 (4th Cir. 2001); Ty,
16 Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1170 (7th
17 Cir. 1997) ("a similarity that is so close as to be
18 highly unlikely to have been an accident of independent
19 creation is evidence of access"); Baxter v. MCA, Inc.,
20 812 F.2d 421, 423 (9th Cir. 1987).

21 The Court need not address this issue because
22 Plaintiff presents no argument on the issue of striking
23 similarity. Moreover, as "striking similarity" exists
24 only when "two songs are so much alike that the only
25 reasonable explanation for such a great degree of
26 similarity is that the later song was copied from the
27 first," it is unlikely Plaintiff could even show
28 striking similarity. Gaste v. Kaiserman, 863 F.2d

1 1061, 1067 n.3 (2d Cir. 1988); Stewart v. Wachowski,
2 574 F. Supp. 2d 1074, 1101, 1103 (C.D. Cal. 2005).
3 Striking similarity simply means that "in human
4 experience, it is virtually impossible that the two
5 works could have been independently created." Stewart,
6 574 F. Supp. 2d at 1103 (quoting 4 Nimmer on Copyright,
7 § 13.02[B]).

8 Plaintiff's expert, Dr. David Stern, does not
9 address the issue of striking similarity. See Pease
10 Decl. Ex. C [Stern Expert Report]. Instead, after
11 analyzing the similarities between BRC and Domino, Dr.
12 Stern determines only that "it is reasonable to
13 conclude on purely musical grounds that the verse
14 melody of 'Domino' is largely based on the verse melody
15 of 'Bright Red Chords.'" Pease Decl. Ex. C. [Stern
16 Expert Report Ex. C p. 5]). Moreover, Dr. Stern's
17 analysis centers on the verse melodies of BRC and
18 Domino, and specifically notes that Domino "contains
19 divergent melodic material" from BRC. Pease Decl. Ex.
20 C. [Stern Expert Report Ex. C. p. 5]. Dr. Stern's
21 opinion is a far cry from concluding that it is
22 "virtually impossible" that BRC and Domino could have
23 been independently created. Stewart, 574 F. Supp. 2d
24 at 1103.

25 Accordingly, the Court finds that Plaintiff has not
26 presented any evidence on the issue of striking
27 similarity.

28 //

1 4. Conclusion

2 Because Plaintiff has failed to present any
3 evidence supporting a plausible theory of access
4 through a "chain of events," a "widespread
5 dissemination" of BRC, or by striking similarity, the
6 Court holds that Plaintiff has failed to present a
7 genuine issue of material fact regarding the Domino
8 Writers' access to BRC. As such, the Court **GRANTS**
9 Defendants' Motion for Summary Judgment.

10 **B. Substantial Similarity**

11 Because Plaintiff has failed to present any
12 admissible evidence establishing that any of the Domino
13 Writers had access to BRC prior to creating Domino, the
14 Court need not determine whether BRC and Domino are
15 substantially similar. See Art Attacks Ink, 581 F.3d
16 at 1145 (affirming grant of summary judgment on
17 copyright infringement claim solely on the basis of
18 insufficient proof of access).

19 **C. Miscellaneous Issues**

20 Defendants include with their Motion several
21 Requests for Judicial Notice [32-16, 80-5] and numerous
22 Evidentiary Objections [80-2].

23 1. Requests for Judicial Notice

24 Under Federal Rule of Evidence 201, a court may
25 take judicial notice of "matters of public record."
26 (Lee v. City of L.A., 250 F.3d 668, 689 (9th Cir.
27 2001)), and a court must take judicial notice of facts
28 "if requested by a party and supplied with the

1 necessary information." Fed. R. Evid. 201(d). A fact
2 is appropriate for judicial notice only if it is not
3 subject to reasonable dispute in that it is (1)
4 generally known within the territorial jurisdiction of
5 the trial court or (2) capable of accurate and ready
6 determination by resort to sources whose accuracy
7 cannot reasonably be questioned. Fed. R. Evid. 201(b).

8 Defendants request this Court take judicial notice
9 of three orders in other cases in this judicial
10 district. While this Court did not rely on any of
11 these orders in reaching its conclusions, the Court
12 nevertheless **GRANTS** Defendants' request for judicial
13 notice as these orders are not subject to reasonable
14 dispute and are capable of accurate and ready
15 determination by resort to sources whose accuracy
16 cannot reasonably be questioned.

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2. Evidentiary Objections

Beyond the evidentiary objections already ruled upon as a basis for reaching the Court's conclusions, the Court need not rule on any other evidentiary objections. Accordingly, the Court deems as **MOOT** Defendants' remaining evidentiary objections.

IV. CONCLUSION

For the above stated reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: November 13, 2013

RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior, U.S. District Court Judge