

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LINA IRIS VIKTOR, a/k/a NATASHA ELENA
COOPER,

Plaintiff,

- against -

KENDRICK LAMAR, a/k/a KENDRICK LAMAR
DUCKWORTH; SOLANA IMANI ROWE, a/k/a
SZA; TOP DAWG ENTERTAINMENT LLC;
INTERSCOPE RECORDS; UNIVERSAL MUSIC
GROUP RECORDINGS, INC. a/k/a UMG
RECORDINGS, INC.; RADICALMEDIA LLC;
DAVE MEYERS; DAVE FREE; FREENJOY, INC.;
BUF, INC.; and JOHN DOES 1-8,

Defendants.

Civil Action No.: 1:18-cv-01554 (KBF)

ECF Case

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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UMG Recordings, Inc.; Dave Friley; Dave Meyers; BUF, Inc.; and Freenjoy, Inc.*

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Defendants respectfully submit this memorandum of law in support of their motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure barring Plaintiff from recovering (i) any profits that Defendants may have received from the recording of the song *All The Stars* (the “Single”) by Kendrick Lamar Duckworth p/k/a Kendrick Lamar (“Lamar”) and Solana Imani Rowe p/k/a SZA (“Rowe”), and/or the album embodying the Single, *Black Panther: The Album (Music From And Inspired By)* (the “Album”); and (ii) any damages that Plaintiff allegedly has sustained to the integrity of her work and her reputation as an artist.

PRELIMINARY STATEMENT

Plaintiff’s lawsuit is the epitome of litigation overreach. Not only does Plaintiff seek to impose liability based on renderings of traditional African motifs that differ from hers, but she also tries to lay claim to profits from the Single and Album, despite the fact that these musical works do not make use of – and otherwise lack any connection to – her paintings (the “Artwork”), and have achieved their success due to myriad factors having nothing to do with her. Plaintiff turns a blind eye to the tremendous success and popularity that Lamar and Rowe enjoyed well before the Single’s release; the fact that the Single already was at the top of the charts *before* the release of the video for the Single (the “Video”) upon which she bases her claims; the groundswell of public interest in the *Black Panther* motion picture (the “Film”) before and after the Single’s release; the prominent use of the Single in the Film’s closing credits; and numerous other facts foreclosing Plaintiff’s position that the profits generated by the Single and Album are attributable to the alleged 19-second use of the Artwork toward the end of the Video.¹ Plaintiff also goes so far to seek an award of integrity right and reputational damages, even though the copyright laws afford her no such remedies. Thus, separate and apart from the shortcomings in Plaintiff’s liability case, which Defendants will address at a later stage, her damages theories fail as a matter of law.² Accordingly, the Court should grant this motion.

¹ The release dates of the various works are: January 4, 2018 (the Single); February 6, 2018 (the Video); February 9, 2018 (the Album); and February 16, 2018 (the Film). *See infra* at 9-13.

² Defendants also will address at a later stage Plaintiff’s effort to recover profits, if any, generated by the Video, which, like the Single and Album, owes its success to multiple considerations unrelated to her.

First, even assuming Plaintiff were able to show that the Video infringes the Artwork (and she is not), she would not be entitled to disgorge any of Defendants' profits from the Single or Album because she cannot show – as the Copyright Act requires – that any such profits “are attributable to the infringement”. Because the Single and Album are audio-only works that make no use of the Artwork, any profits that they generate are indirect profits. In order to recover such profits under the Act, Plaintiff must establish a causal nexus, not a remote or speculative connection, between them and the alleged use of the Artwork in the Video. Plaintiff cannot possibly meet this burden because of the virtually endless permutations of factors unrelated to the alleged use that might explain why millions of people have decided to stream or buy the Single or Album, including the following:

- (i) the worldwide popularity of Lamar, his music, and earlier videos; (ii) the worldwide popularity of Rowe, her music, and earlier videos; (iii) the numerous accolades, including a Pulitzer Prize, and dozens of Grammy and other nominations and awards that Lamar has garnered; (iv) the numerous accolades, including a large number of Grammy and other nominations and awards that Rowe has received; (v) the music and lyrics embodied in the Single; (vi) Lamar's vocal performance embodied in the Single; (vii) Rowe's vocal performance embodied in the Single; (viii) the Film's pre-release buzz and subsequent success and cultural impact; (ix) the use of the Single in the Film's closing credits; (x) the music and lyrics embodied in any one of the 13 tracks on the Album in addition to the Single; (xi) the recorded performances embodied in any of those tracks; (xii) the popularity of the various musical artists on the Album other than Lamar and Rowe; (xiii) the extensive admittedly non-infringing content in the 19-second scene at issue, and in the other 3 minutes and 35 seconds of the Video; (xiv) preorders of the Single and Album and other purchases of the Single predating the Video's release; and (xv) basic musical curiosity.

Common sense and logic dictate that the alleged 19-second use of the Artwork in the Video is far more speculative (and, in any event, no less speculative) a reason for people's decisions to stream or buy the Single or Album than any one, or any combination of, the above factors. Any attempt by Plaintiff to tie such decisions to the alleged use is especially suspect due to the added uncertainty as to whether people who play the Video actually watch it instead of just listening to the audio, and, if they do watch, whether they do so until the final minute when the alleged use

occurs. No amount of evidence that Plaintiff may seek to adduce could demonstrate otherwise. Plaintiff, thus, has no non-speculative grounds that allow her to recover Single or Album profits.

Second, Plaintiff has no right to recover damages for supposed harm to the integrity of her work and her reputation as an artist. As a threshold matter, longstanding Second Circuit law forecloses Plaintiff from obtaining any such recovery. In addition, the only conceivable authority for integrity right or reputational damages – the moral rights provisions in 17 U.S.C. § 106A – is inapplicable here because Plaintiff does not and cannot allege, as these provisions require, that Defendants have used or done anything to the actual Artwork. To the contrary, the premise of Plaintiff’s lawsuit is that Defendants *copied* the Artwork, not that they used the Artwork itself. Plaintiff, therefore, has no basis for recovering reputational damages.

FACTUAL BACKGROUND

Plaintiff’s Purported Claim and Unsupportable Damages Theories

According to Plaintiff, she first put Defendants on notice of her purported claim on Saturday, February 10, 2018.³ (Amended Complaint (“AC”) (Dkt. 30) ¶ 59) Although Plaintiff does not indicate in her pleading when she first sought to enlist *The New York Times* in her efforts, the newspaper ran an article about her purported claim the very next day. (*Id.*) On February 20, 2018, nine days after *The New York Times* article ran, Plaintiff filed suit.

As Plaintiff acknowledges, the Video “is 3 minutes 54 seconds long, and consists of a number of distinct scenes featuring different settings, costumes, and lighting.” (AC ¶ 42) Plaintiff maintains that one such scene – “[s]tarting at around the 2:59 mark [and lasting] approximately 19 seconds” (*id.* ¶ 56) – features “an unauthorized copy” of the Artwork.⁴ (*Id.* ¶ 2; *see also id.* ¶¶ 56-58) This supposed 19-second use of the Artwork – which people who play the Video may or may not see, depending on whether they actually watch it instead of simply listening to the audio, and, if they do watch, whether they do so past the 2:59 mark – is the crux

³ This was four days after the Video’s release. (AC ¶ 41)

⁴ The titles of the paintings comprising the Artwork are *Constellations I*, *Constellations II*, and *Constellations III*. (AC ¶ 1)

of Plaintiff's purported claim (*id.* ¶¶ 2, 56-58), and the basis upon which she seeks, among other forms of relief, disgorgement of indirect profits, if any, generated by the Single and Album, and damages for the purported harm that the alleged infringement has caused to the integrity of her work and to her reputation. (*Id.* ¶¶ 9, 67, 73, 79; AC at 19, ¶ C (requesting profits “indirectly attributable” to the alleged infringement, and actual damages for the supposed harm to “[Plaintiff’s] reputation”))

With respect to the indirect profits from the Single and Album (if any), Plaintiff appears to maintain that they are attributable to the supposed infringement simply because the Video allegedly “promotes” the Single and Album. (*Id.* ¶ 43) However, as demonstrated below, even assuming the Video promotes the Single and Album, this fact does not establish that any such profits are *attributable* to the supposed 19-second use of the Artwork in the Video – as required for Plaintiff to disgorge them. Indeed, there are literally endless reasons having nothing to do with the Artwork why millions of people decided to stream and/or purchase the Single and Album. Thus, any argument by Plaintiff that the supposed 19-second use of the Artwork in the Video is the sole reason – or even a reason – why these millions of individuals did what they did is pure speculation. Accordingly, Plaintiff’s attempt to disgorge profits generated by the Single and Album is wholly improper.

Finally, no amount of evidence will allow recovery of integrity right or reputational damages because Plaintiff has no legal right to them. Her request for such damages is improper.

Some of the Myriad Reasons Why People May Stream or Buy the Single or Album

Lamar’s Extraordinary Achievements and Popularity

Lamar is among the most successful and acclaimed musical artists of his generation. His major label debut release, *good kid, m.A.A.d city*, is part of the Library of Congress’s permanent collection. (*See* accompanying Declaration of Maura K. Gierl (“Gierl Decl.”) ¶ 2, Exh. 1) Earlier this year he received the Pulitzer Prize for music for his third major label release, *DAMN*. (*Id.* ¶ 3, Exh. 2) The Pulitzer Board described *DAMN*. as “a virtuosic song collection unified by its vernacular authenticity and rhythmic dynamism that offers affecting vignettes capturing the

complexity of modern African-American life.” (*Id.*) In discussing the award, *The New York Times* observed that Lamar had taken “home an even more elusive honor [than the Grammy for Album of the Year]”, and that he “is not only the first rapper to win the award since the Pulitzers expanded to music in 1943, but he is also the first winner who is not a classical or jazz musician.” (*Id.* ¶ 4, Exh. 3) In a November 2017 story, *Variety* described Lamar as “inhabiting the kind of rarefied sphere where the various standards of success — pop chart dominance and cultural relevance, street-level authenticity and worldwide stardom — all seem to align.” (*Id.* ¶ 5, Exh. 4) The public’s embrace of Lamar and his music goes hand in hand with this critical acclaim.

First, Lamar’s videos, excluding those for songs on the Album and those with fewer than 10 million plays, have amassed over **4.3 billion** plays on YouTube alone. (*Id.* ¶ 6, Exh. 5) Lamar’s own videos account for at least **1.7 billion** of these plays, more than half of which are for five songs from his most recent studio album, *DAMN.*, which came out on April 14, 2017, less than ten months before the Video’s release.⁵ (*Id.* ¶ 6, Exh. 5) Videos by Taylor Swift, Sia, and many other musical artists in which Lamar appears as a featured artist (all predating the Video) account for more than **2.6 billion** of these plays.⁶ (*Id.* ¶ 6, Exh. 5) Of course, were other video platforms besides YouTube and all of Lamar’s videos factored in, the total number of plays would be significantly higher than 4.3 billion. Regardless, the magnitude of Lamar’s

⁵ The videos and number of plays for the *DAMN.* tracks are: *HUMBLE.* (514 million); *DNA.* (174 million); *LOYALTY.* (155 million); *ELEMENT.* (77 million); and *LOVE.* (66 million). (Gierl Decl. ¶ 6, Exh. 5) The videos and number of plays for Lamar’s other tracks are *Bitch, Don’t Kill My Vibe* (explicit) (114 million); *King Kunta* (113 million); *Alright* (108 million); *Poetic Justice* (explicit) (99 million); *Swimming Pools (Drank)* (clean) (94 million); *The Recipe* (lyric video) (67 million); *i* (67 million); *Swimming Pools (Drank)* (explicit) (45 million); *God Is Gangsta* (15 million); *Rigamortis* (13 million); *These Walls* (explicit) (12 million); and *For Free?* (10 million). (*Id.* ¶ 6, Exh. 5) All of the latter videos also predate the Video. (*Id.*)

⁶ The videos and number of plays for the videos by other artists featuring Lamar are *Bad Blood* (Taylor Swift) (1.2 billion); *The Greatest* (Sia) (560 million); *Goosebumps* (Travis Scott) (186 million); *Collard Greens* (ScHoolBoy Q) (126 million); *Don’t Wanna Know (Audio)* (Maroon 5) (96 million); *YOLO* (The Lonely Island) (86 million); *New Follower* (Rich The Kid) (68 million); *Memories Back Then* (T.I.) (67 million); *We Up (Explicit)* (50 Cent) (48 million); *Classic Man (Remix)* (Jidenna) (46 million); *How Many Drinks? (Remix)* (Miguel) (44 million); *Fragile (Director’s Cut)* (Tech N9ne) (37 million); *Perfect Pint* (Mike WiLL Made-It) (21 million); *That’s Me Right There* (Jasmine V) (16 million); *Never Catch Me* (Flying Lotus) (10 million); *Say Wassup* (Jay Rock) (11 million); and *Mask Off (Remix) (Audio)* (Future) (14 million). (Gierl Decl. ¶ 6, Exh. 5)

popularity – across multiple musical genres – that this figure reflects is extraordinary.⁷

Second, all three of Lamar’s major label albums have received platinum or multi-platinum certifications from the Recording Industry Association of America (the “RIAA”).⁸ His debut and most recent albums, *good kid, m.A.A.d city* and *DAMN.*, respectively, each earned “3x Platinum” certifications for selling more than **three million** album or album equivalent units in the U.S.⁹ (*Id.* ¶ 9, Exh. 8) His sophomore album, *To Pimp A Butterfly*, earned a platinum certification for selling more than **one million** album or album equivalent units in the U.S. (*Id.* ¶ 9, Exh. 8)

Third, no fewer than **15 singles** from the above albums also have earned multi-platinum or platinum certifications from the RIAA. (*Id.* ¶ 9, Exh. 8) *HUMBLE.*, which appears on Lamar’s latest album *DAMN.*, received a “7x Platinum” certification for selling more than **seven million** track or track equivalent units in the U.S.¹⁰ (*Id.* ¶ 9, Exh. 8) *Swimming Pools (Drank)* and *Bitch, Don’t Kill My Vibe*, both from *good kid, m.A.A.d city*, and *LOVE.*, from *DAMN.*, earned “4x Platinum” certifications for selling more than **four million** track or track equivalent units in the U.S. (*Id.* ¶ 9, Exh. 8) *DNA.*, which also is on *DAMN.*, received a “3x Platinum” certification for selling more than **three million** track or track equivalent units in the U.S. (*Id.* ¶

⁷ As further evidence of Lamar’s broad appeal, on January 8, 2018, he served as the first – and, to date, only – halftime performer at a NCAA College Football Playoff National Championship game. (Gierl Decl. ¶ 7, Exh. 6) The performance featured the Single, and three songs from *DAMN.*, *HUMBLE.*, *DNA.*, and *ELEMENT.* (*Id.*)

⁸ RIAA platinum and gold certifications confirm that an album or single has sold more than 1,000,000 or 500,000 units in the U.S. alone, respectively. (Gierl Decl. ¶ 8, Exh. 7) To calculate album sales, the RIAA “counts album sales, song sales and on-demand audio and/or video song streams at the formula of 1,500 on-demand audio and/or video song streams = 10 track sales = 1 album sale.” (*Id.*) To calculate single sales, the RIAA “counts both downloads and on-demand music streams[, and applies] on-demand audio and/or video song streams . . . towards the thresholds required for certification at the formula of 150 on-demand streams being equivalent to one download sale.” (*Id.*)

⁹ **All 14 songs** on *DAMN.* received RIAA certifications, including 5 multi-platinum certifications for *HUMBLE.*, *LOVE.*, *DNA.*, *LOYALTY.*, and *ELEMENT.*, and 9 gold certifications for *BLOOD.*, *YAH.*, *FEEL.*, *PRIDE.*, *LUST.*, *XXX.*, *FEAR.*, *GOD.*, and *DUCKWORTH.* (Gierl Decl. ¶ 9, Exh. 8) Lamar also received five Grammy Awards and multiple other awards for *DAMN.*, *HUMBLE.*, and *LOYALTY.* (*See id.* ¶¶ 17-18, 23-25, Exhs. 16, 21-22; *see also, infra*, at n.14)

¹⁰ *HUMBLE.* had the second most domestic audio streams of any single in 2017 with a total of 580,866,000. (Gierl Decl. ¶ 11, Exh. 10)

9, Exh. 8) *M.A.A.D City* and *Poetic Justice*, which appear on *good kid, m.A.A.d city*, and *LOYALTY.*, which appears on *DAMN.*, earned “2x Platinum” certifications for selling more than **two million** track or track equivalent units in the U.S. (*Id.* ¶ 9, Exh. 8) And, seven tracks from all three of Lamar’s major studio albums received platinum certifications for selling more than **one million** track or track equivalent units in the U.S.¹¹ (*Id.* ¶ 9, Exh. 8)

Fourth, the RIAA also has recognized a significant number of other songs by or featuring Lamar. His independently released, first full-length album, *Section.80*, and no fewer than **12 singles** from the above albums – including 9 from his most recent studio album, *DAMN.*¹² – have received gold certifications from the RIAA for selling more than 500,000 album or album equivalent units and 500,000 track or track equivalent units in the U.S., respectively.¹³ (*Id.* ¶ 9, Exh. 8) Other artists’ releases featuring Lamar have earned multi-platinum and other certifications from the RIAA, including Maroon 5’s *Don’t Wanna Know* (3x platinum), Rich The Kid’s *New Freezer* (platinum), and Sia’s *The Greatest* (gold). (*Id.* ¶ 10, Exh. 9)

Thus, the RIAA certifications confirm that, ***in the U.S. alone***, Lamar’s fans have consumed more than **53 million units** of his solo albums and singles – and singles on which he is a featured performer – released ***before*** the Single, Album, Video, and Film. While that figure, by itself, makes it impossible to overstate Lamar’s popularity leading into the releases of the latter works, it does not reflect the consumption of Lamar’s music outside the U.S., which would push the total consumption figure substantially higher than 53 million units.

The music industry accolades that Lamar has earned are similarly far-reaching. In the past four years, Lamar has received nominations for twenty-nine Grammy Awards, including nominations for Album of the Year for each of his three major label studio albums, *good kid*,

¹¹ The seven tracks are *Backseat Freestyle*, *Money Trees*, and *The Recipe* on *good kid, m.A.A.d city*; *King Kunta*, *i*, and *Alright* on *To Pimp A Butterfly*; and *ELEMENT* on *DAMN.* (Gierl Decl. ¶ 9, Exh. 8)

¹² *See, supra*, at n.9.

¹³ The three other singles are *untitled 02 | 06.23.2014* on *untitled unmastered.*; *The Blacker The Berry* on *To Pimp A Butterfly*; and *A.D.H.D.* on *Section.80*. (Gierl Decl. ¶ 9, Exh. 8)

m.A.A.d city, *To Pimp A Butterfly*, and *DAMN*. (*Id.* ¶ 12, Exh. 11) Lamar also has won twelve Grammy Awards, including, most recently, five at the 60th Annual Grammy Awards on January 28, 2018.¹⁴ (*Id.* ¶ 12, Exh. 11) Further underscoring his music industry prominence, Lamar gave the opening performance at this year’s Grammy Awards – a medley of two songs from *DAMN*, *DNA*, and *XXX*, one song from the Album, *King’s Dead*, and Rich The Kid’s song *New Freezer* on which Lamar appears as a featured artist. (*Id.* ¶ 13, Exh. 12) At the 58th Annual Grammy Awards in 2016, Lamar delivered what was described as a “legendary performance” and “one of the most striking . . . to hit the Grammy stage in years” featuring two songs, *The Blacker The Berry* and *Alright*, from his sophomore major label album, *To Pimp A Butterfly*. (*Id.* ¶ 14, Exh. 13) In addition, Lamar has received nominations for – and won – numerous Billboard Music Awards; American Society of Composers, Authors, and Publishers Awards; and Broadcast Music, Inc. Awards, among many others. (*Id.* ¶¶ 15-26, Exhs. 14-23)

Apart from his myriad achievements, Lamar has a significant social media following. At least 9.5 million people follow Lamar on Instagram, despite the fact that he only has 21 posts. (*Id.* ¶ 27, Exh. 24) In addition, 8.5 million people follow him on Facebook. (*Id.* ¶ 28, Exh. 25) This following further reflects the public’s keen interest in Lamar and his work.

As the foregoing makes clear, Lamar is among the most successful and popular figures in music and culture today. This undisputable fact, by itself and in combination with the other facts set forth below, demonstrates that Plaintiff’s causation theory – *i.e.*, that profits generated by the Single and Album are attributable to the alleged 19-second use of the Artwork in the final minute of the Video – is far more speculative (and, in any event, no less speculative) an explanation for such profits than many other considerations unrelated to Plaintiff.

¹⁴ The five awards were for Best Rap Album (*DAMN*); Best Music Video (*HUMBLE.*); Best Rap Song (*HUMBLE.*); Best Rap Performance (*HUMBLE.*); and Best Rap/Sung Performance (*LOYALTY.*). (Gierl Decl. ¶ 12, Exh. 11) Lamar also won five awards at the 58th Annual Grammy Awards on February 15, 2016 – for Best Rap Album (*To Pimp A Butterfly*); Best Rap Song (*Alright*); Best Rap Performance (*Alright*); Best Rap/Sung Collaboration (*These Walls*); and Best Music Video (*Bad Blood*). (*Id.*) At the 57th Annual Grammy Awards on February 8, 2015, Lamar won the awards for Best Rap Song (*i*); and Best Rap Performance (*i*). (*Id.*)

Rowe's Breakout Success

Rowe, who also is featured prominently on the Single, took the music industry by storm in 2017 with her major label debut album, *Ctrl*. The release garnered several multi-platinum, platinum, and gold certifications from the RIAA, including “2x Platinum” certifications for the songs *The Weekend* and *Love Galore*, which have sold more than **two million** track or track equivalent units in the U.S.; a platinum certification for *Ctrl* for selling more than **one million** album or album equivalent units in the U.S.; and two gold certifications for the songs *Broken Clocks* and *Garden (Say It Like Dat)*, which have each sold more than **500,000** track or track equivalent units in the U.S. (*Id.* ¶ 29, Exh. 26) In addition, Rowe received five Grammy nominations for the album,¹⁵ which, according to *The New York Times*, made her the most nominated female artist at the 60th Annual Grammy Awards on January 28, 2018. (*Id.* ¶¶ 30-31, Exhs. 27-28) At the 49th NAACP Image Awards on January 15, 2018, Rowe won the Outstanding New Artist Award (*id.* ¶ 32, Exh. 29), and received three other nominations.¹⁶ Rowe also won the award for Best New Artist at the BET Awards on June 24, 2018. (*Id.* ¶ 33, Exh. 32)

Thus, Rowe, too, enjoyed tremendous success and visibility in the lead-up to and following the Single's release. This undisputable fact, by itself and in combination with the other facts set forth below and immediately above, also demonstrates that Plaintiff's causation theory is far more speculative (and, in any event, no less speculative) an explanation for any profits generated by the Single and Album than many other considerations unrelated to Plaintiff.

The Single's Appeal and Popularity Independent of the Video

The Single was released on January 4, 2018 to radio, and for digital download and

¹⁵ The five nominations were for (i) Best New Artist; (2) Best R&B Performance (*The Weekend*); (3) Best R&B Song (*Supermodel*); (4) Best Urban Contemporary Album (*Ctrl*); and (5) Best Rap/Sung Performance (*Love Galore*). (Gierl Decl. ¶ 30, Exh. 27)

¹⁶ The nominations were for Outstanding Female Artist; Outstanding Duo, Group or Collaboration (*Love Galore*); and Outstanding Song – Contemporary (*Love Galore*). (Gierl Decl. ¶ 32, Exh. 29) Lamar also was in the spotlight at the 49th NAACP Image Awards, receiving a nomination for Outstanding Male Artist, and winning the awards for Outstanding Album (*DAMN.*); Outstanding Duo, Group or Collaboration (*LOYALTY.*); and Outstanding Song – Contemporary (*HUMBLE.*). (*Id.*)

streaming. (*Id.* ¶ 34, Exh. 31) The Single received critical praise from publications across the artistic spectrum. For example, *XXL* applauded the Single, referencing Lamar’s “defiant bars” and Rowe’s “powerful, but pop-accessible hook”. (*Id.* ¶ 35, Exh. 32) *Rolling Stone* described Lamar’s performance on the Single as “defiant”, and Rowe’s verse “enthraling”. (*Id.* ¶ 36, Exh. 33) Against the backdrop of these positive reviews, Lamar’s widespread popularity and success, Rowe’s breakout star status, and the tremendous anticipation for the Film (*see infra* at 13), it is no surprise that the Single became an immediate hit.

The Single went to and remained for five months at the top of the *Billboard* charts shortly after its January 4, 2018 release:

<i>All The Stars Billboard Chart History</i>		
Date	Hot R&B List	Hot 100 List
January 7, 2018	24	-
January 14, 2018	4	43
January 21, 2018	4	53
January 28, 2018	4	54
February 4, 2018	3	54
<i>Video Release – February 6, 2018</i>		
<i>Album Release – February 9, 2018</i>		
February 11, 2018	3	31
<i>Film Opening – February 16, 2018</i>		
February 18, 2018	2 (peak)	9
February 25, 2018	2	7 (peak)
March 4, 2018	3	10
March 11, 2018	3	11
March 18, 2018	3	10
March 25, 2018	4	14
April 1, 2018	4	16
April 8, 2018	5	19
April 15, 2018	5	25
April 22, 2018	5	31
April 29, 2018	5	44
May 6, 2018	10	49
May 13, 2018	6	35
May 20, 2018	6	33
May 27, 2018	5	33
June 3, 2018	6	41

(*Id.* ¶¶ 37-38, Exhs. 34-35)

As reflected above, the Single entered the charts just days after its release, reaching No. 24 on *Billboard*'s Hot R&B List released on January 7, 2018. By the following week, the Single climbed to No. 4 (and entered *Billboard*'s Hot 100 List at No. 43), where it remained for three weeks before rising to No. 3 the week of February 4, 2018. The Single's position on the Hot R&B List did not change the week of February 11, 2018 following the release of the Video and Album on February 6 and 9, 2018, respectively; however, it rose to No. 2 (its peak) the week of February 18, 2018 immediately after the Film opened. Although the Single climbed to No. 31 on the Hot 100 List the week of February 11, 2018, both the Video and the Album were released the week before at the same time that the public's anticipation for the Film's release was growing even more feverish (*see id.* ¶¶ 40-42, Exhs. 37-39), making it impossible to determine which of these factors, if any, accounted for the Single's movement on the chart. Regardless, the Single did not break the top 10 or hit its peak – at No. 7 – on the Hot 100 List until *after* the Film's opening, strongly suggesting that the Film, which features the Single in its closing credits, had an immediate impact on the Single.

Thus, it is indisputable that the Single was a huge success well before the Video's release. This undisputable fact – alone and in combination with the other facts set forth below and immediately above – further demonstrates that Plaintiff's causation theory is far more speculative (and, in any event, no less speculative) an explanation for any profits generated by the Single and Album than many other considerations unrelated to Plaintiff.

The Album's Appeal and Popularity Independent of the Video

The Album was released on February 9, 2018, one week before the Film opened. (*Id.* ¶ 39, Exh. 36) The Album, like the Film, is a cultural phenomenon in its own right. Curated by Lamar and Anthony Tiffith of TDE, the Album features 14 different tracks, including the Single, by a variety of well-known and up-and-coming musical artists from around the world, including Lamar, Rowe, The Weeknd, Vince Staples, Anderson.Paak, Jay Rock, SOB X RBE, Jorja Smith, Sjava, and many others. (*Id.*) According to *The Los Angeles Times*, the Album “weave[s] a dense and often gorgeous fabric of sound” that makes use of “variety to embody and examine

ideas about the African diaspora at a time of increasing immigration control.” (*Id.* ¶ 40, Exh. 37) As the same article observes (and is apparent upon listening to the Album), the Album “utilize[s] music as a storytelling device – including tunes delivered from characters’ points of view – and . . . reflect[s] the sprawl of an ambitious narrative with a soundtrack that coheres even as it showcases a diversity of styles.” (*Id.*)

Various sources attribute the Album’s success to Lamar and the Film. For example, *Rolling Stone* reported that the Album “has been nearly as feverishly anticipated as the [F]ilm, and no wonder: It is helmed by another improbable straddler of cultural categories, Kendrick Lamar, A-list pop star and Black Lives Matter-era protest poet nonpareil.” (*Id.* ¶ 41, Exh. 38) The Guardian highlighted the excitement generated by Lamar’s role in putting the Album together, and the appeal of the other musical artists joining him on the Album:

Lamar is so revered that even his more ephemeral releases are greeted with elation: if the guy’s so good that he can put out a collection of untitled demos and outtakes [– *i.e.*, Lamar’s album *untitled unmastered*. –] that’s better than many artists’ main albums, why shouldn’t people get excited about a film soundtrack created under his aegis? And particularly when it assembles such an intriguing musical cast: big names – the Weeknd, Vince Staples, Anderson.Paak – alongside relative unknown artists Mozzy, Babes Wodumo, SOB x RBE and South African vocalist Sjava singing in Zulu. Moreover, if you believe that Lamar is at the forefront of an impressive renaissance in hip-hop and R&B, a confluence of high-altitude artistry and righteous sociopolitical anger that harks back to the revered era that was bookended by the arrival of psychedelic soul and the rise of disco – an era in which soundtracks to films that expanded black representation in commercial cinema had an important part to play – then perhaps Black Panther is his *Superfly*, his *Shaft*.

(*Id.* ¶ 42, Exh. 39)

The combination of public interest in the Film and the efforts by Lamar and his collaborators on the Album made the Album a huge success. ***Eight of the fourteen tracks*** on the Album made it onto *Billboard*’s Top 100 list.¹⁷ (*Id.* ¶ 43, Exh. 40) The Album earned a

¹⁷ The eight tracks are the Single; *King’s Dead* by Jay Rock, featuring Lamar, Future, and James Blake; *Pray For Me* by Lamar and The Weeknd; *X* by Lamar, Schoolboy Q, 2 Chainz, and Saudi; *The Ways* by Khalid and Swae Lee; *Paramedic!* by SOB X RBE; *Big Shot* by Lamar and Travis Scott; and *Black Panther* by Lamar. (Gierl Decl. ¶ 43, Exh. 40)

platinum certification from the RIAA, and four of its tracks also earned RIAA certifications, including the Single (2x platinum); *King's Dead* (platinum); *Pray For Me* (platinum); and *X* (gold). (*Id.* ¶¶ 9-10 Exhs. 8-9) The videos for tracks on the Album other than the Single have also been tremendously successful, including the lyric video for *Pray For Me*, which has **nearly 107 million plays**, and the video for *King's Dead*, which has **almost 84 million plays**. (*Id.* ¶ 6, Exh. 5)

Thus, the success, acclaim, and appeal that the Album and several of its individual tracks (other than the Single) have enjoyed unrelated to the Video are indisputable. These undisputable facts – alone and in combination with the other facts set forth below and immediately above – additionally demonstrate that Plaintiff's causation theory is far more speculative (and, in any event, no less speculative) an explanation for any profits generated by the Single and Album than many other considerations unrelated to Plaintiff.

The Film's Cultural Watershed Moment

Many observers regard the Film, which opened in the U.S. on February 16, 2018, as part of a larger cultural watershed moment for both race and gender minorities – a moment that is particularly relevant given the current cultural and political climate. (*See id.* ¶¶ 44-46, Exhs. 41-43) *The New York Times* noted that “[r]ace matters in [the Film] and it matters deeply . . . as a means to explore larger human concerns about the past, the present and the uses and abuses of power.” (*Id.* ¶ 44, Exh. 41) *The Los Angeles Times* observed that the Film fills a void in black cinema, and “is having a cultural moment fueled by massive pent-up demand for what is expected to be the first global superhero blockbuster to feature a mostly black cast and an African American director.” (*Id.* ¶ 45, Exh. 42) *Time* opined that the Film is “about what it means to be black in both America and Africa—and, more broadly, in the world”, and, as such, mirrors the current political landscape and zeitgeist of America in 2018. (*Id.* ¶ 46, Exh. 43) Plaintiff effectively admits as much. (*See* AC ¶ 6 (the Film (and Video) promotes “themes of black and female empowerment and the end of racist and gender exploitation, themes particularly topical in the current environment”))

In addition to (and, possibly, as a result of) its cultural impact, the Film has earned strong praise from critics and fans alike, as reflected in its A+ CinemaScore and 97% Rotten Tomatoes score. (Gierl Decl. ¶¶ 47-48, Exhs. 44-45) It is no surprise, then, that the Film smashed long-time box office records, grossing more than \$200 million in its first three days, making it one of the “top five domestic openings of all time” and the “second highest four-day domestic opening of all time.” (*Id.* ¶ 49, Exh. 46) Internationally, the Film fared just as well, “with No. 1 debuts in almost all territories”. (*Id.*) As of April 10, 2018, the Film had grossed \$1.3 billion worldwide and \$667 million domestically. (*Id.* ¶ 50, Exh. 47)

In light of the Film and Album’s close relationship, and the fact that the Film features the Single during its closing credits, the Film’s cultural significance and box office success indisputably helped drive the success of the Single and Album, and any profits these musical works have generated. These undisputable facts – alone and in combination with the other facts set forth immediately above – also demonstrate that Plaintiff’s causation theory is far more speculative (and, in any event, no less speculative) an explanation for such profits than many other considerations unrelated to Plaintiff.

LEGAL STANDARD

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is mandated where a party “fails to make a showing sufficient to establish the existence of an element essential to that party’s [claim], and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. “When the moving party does not bear the ultimate burden on a particular claim or issue, it need only make a showing that the non-moving party lacks evidence from which a reasonable jury could find in the non-moving party’s favor at trial.” *Jetmax Ltd. v. Big Lots, Inc.*, No. 15-cv-9597, 2017 WL 3726756, *3 (S.D.N.Y. Aug. 28, 2017) (citing *Celotex*, 477 U.S. at 322-23). Summary judgment is proper when no reasonable jury “could find by a preponderance of the evidence” for the nonmoving party. *See Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Further, “[u]nder Federal Rule of Evidence 201, a court may take judicial notice, at ‘any stage of the proceeding,’ of any fact ‘that is not subject to reasonable dispute because’ it ‘can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’” *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 166 (S.D.N.Y. 2015) (quoting Fed. R. Evid. 201(b)(2), (d)). “Pursuant to Rule 201, courts have considered newspaper articles, . . . and information publicly announced on certain non-governmental websites”. *Id.* (citations omitted). Further, the fact that “a [song] has been and is a well-known and popular piece” is judicially noticeable, *Robbins Music Corp. v. Weinstock*, 107 F. Supp. 102, 104 (S.D.N.Y. 1952), as are *Billboard* music charts, see *Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 300 (S.D.N.Y. 2012); *Straughter v. Raymond*, No. 08 Civ. 2170, 2011 WL 3651350, at *12 (C.D. Cal. Aug. 19, 2011); and information regarding musical artists and their performances based on information available on non-party websites. See *Williams v. Midwest Airlines, Inc.*, 321 F. Supp. 2d 993, 994 n.2 (E.D. Wisc. 2004).

ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO DISGORGE DEFENDANTS’ PROFITS FROM THE SINGLE OR ALBUM, IF ANY, BECAUSE NO NON-SPECULATIVE EVIDENCE COULD DEMONSTRATE A CAUSAL NEXUS BETWEEN THE PROFITS AND THE ALLEGED USE OF THE ARTWORK IN THE VIDEO

Plaintiff’s request to disgorge indirect profits generated by the Single and Album has no factual or legal support. The Court, therefore, should grant Defendants’ motion for summary judgment on her claim for such profits.

Pursuant to Section 504(b) of the Copyright Act, a copyright owner is entitled to recover “profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages”. 17 U.S.C. § 504(b). To establish a defendant’s profits, a plaintiff initially must present proof of defendant’s “gross revenue”. *Id.* “The term ‘gross

revenue’ must be construed as ‘gross revenue reasonably related to the infringement, *not unrelated revenues.*’” *Complex Sys., Inc. v. ABN Ambro Bank N.V.*, No. 08 Civ. 7497, 2013 WL 5970065, *2 (S.D.N.Y. Nov. 8, 2013) (quoting *Davis v. The Gap, Inc.*, 246 F.3d 152, 160 (2d Cir. 2001)) (emphasis added). In other words, the owner must demonstrate a “reasonable relationship” and “causal link” between the alleged infringement and the gross revenues it seeks to disgorge. See *Davis*, 246 F.3d at 159-60; *Granger v. Gill Abstract Corp.*, 566 F. Supp. 2d 323, 332 (S.D.N.Y. 2008) (“in order to recover Defendants’ profits, Plaintiff is required to establish a ‘causal link’ between [the] profits and the infringement”).

Profits can be direct or indirect, the former referring to the profits “generated by selling an [allegedly] infringing product”, and the latter referring to the profits that have “a more attenuated nexus to the [alleged] infringement.” *Mackie v. Rieser*, 296 F.3d 909, 914 (9th Cir. 2002). “Damages only remotely or speculatively attributable to the infringement should be precluded.” *Complex Sys.*, 2013 WL 5970065, at *2; see also *Mackie*, 396 F.3d at 915 (courts should bar recovery of profits that are only “remotely or speculative attributable to the infringement”, or if the “proffered measure of damages . . . is too speculative”) (internal quotations omitted). Accordingly, a copyright plaintiff has a *heightened burden* to demonstrate a “causal nexus”, not merely a connection, between the alleged infringement and the indirect profits she seeks to disgorge. *Complex Sys.*, 2013 WL 5970065, at *3.

“[A] district court must conduct a threshold inquiry into whether there is a legally sufficient causal link between the infringement and subsequent indirect profits” before allowing a plaintiff’s indirect profits claim to continue. *Mackie*, 296 F.3d at 915. In fact, it is “common sense” that the court must first determine that the “*infringing act had an effect on profits* before the parties can wrangle about apportionment” – *i.e.*, before the defendant must come forth with

evidence to prove those profits not attributable to the copyrighted work. *Id.* (emphasis added). Indeed, “[b]ecause of the at-best *highly speculative nature of all indirect profits claims*’ . . . *the decision to ‘send[] such claims to a jury should be extremely rare.’*” *Int’l Bus. Machs. Corp. v. BGC Partners, Inc.*, No. 10 Civ. 128, 2013 WL 1775437, *3 (S.D.N.Y. Apr. 25, 2013) (alteration in original & emphasis added) (quoting 6 William F. Patry, PATRY ON COPYRIGHT § 22:131 (2010)). Thus, to survive summary judgment, Plaintiff must demonstrate that the indirect profits she seeks to disgorge are “attributable” to the alleged infringement, “mere connection or usage alone [is] insufficient.” *Complex Sys.*, 2013 WL 5970065, at *5; *see also Mackie*, 296 F.3d at 915-16 (to survive summary judgment, “a copyright holder must proffer sufficient non-speculative evidence to support a causal relationship between the infringement and the profits generated indirectly from such an infringement.”). Because no evidence could possibly satisfy Plaintiff’s burden to meet the “statutory requirement of showing *attribution*”, her request to disgorge indirect profits from the Single and Album should be dismissed. *See Complex Sys.*, 2013 WL 5970065, at *5 (emphasis in original).

As the Ninth Circuit held in *Mackie*, a case directly on point and cited by this Court in *Complex Systems*, when there are “virtually endless permutations” of reasons having nothing to do with the alleged infringement that may account for indirect profits, a court should dismiss the claim for such profits. *See Mackie*, 296 F.3d at 916. In *Mackie*, an alleged infringer used the plaintiff’s copyrighted artwork in a 24-page direct-mail brochure that promoted subscriptions to the Seattle Symphony Orchestra (the “Symphony”). *Id.* at 912. The plaintiff’s artwork appeared on page 12 of the brochure, and collaterally on various other pages. *Id.* The plaintiff demanded, among other things, the Symphony’s profits generated by the season promoted by the brochure, as well as profits from future seasons, “arguing that many patrons who subscribed to the [season]

because of the infringing collage later renewed their subscriptions.” *Id.* at 913. In affirming the district court’s dismissal of the plaintiff’s demand for such profits, the Ninth Circuit noted that, “[i]ntuitively, we can surmise virtually endless permutations to account for an individual’s decision to subscribe to the [season], reasons that have nothing to do with the artwork in question.” *Id.* at 915. In support of its holding, the court specifically listed the Symphony’s reputation, the conductor and musicians, the musical programming, “or simply a love of music”, as reasons that *could* account for the Symphony’s sales. *Id.* at 916. Tellingly, the court highlighted that the plaintiff’s theory of causation would be “no less speculative than [the court’s] effort in this paragraph to enumerate even a relatively short list of the myriad factors that could influence an individual’s purchasing decisions.” *Id.*; *see also Complex Sys.*, 2013 WL 5970065, at *13 (“a customer may have many reasons to need a service” regardless of whether the defendant used the allegedly infringing software at issue).

Plaintiff’s causation theory here is even more speculative than the plaintiff’s in *Mackie*. Regardless of what Plaintiff may try to point to or obtain through discovery to show a connection between the alleged 19-second use of the Artwork toward the end of the Video and any profits generated by the Single and Album, the factors outlined on page 2 above and discussed in detail on pages 4 through 14 above, and common sense and logic demonstrate that virtually endless combinations of reasons – ***wholly unrelated to the alleged use*** – could account for people’s decisions to stream or buy the Single or Album, and, thus, any profits that these works generate. The alleged use of Plaintiff’s Artwork is far more speculative (and, in any event, no less speculative) an explanation for such decisions than any one, or any combination of, those factors, especially in light of (a) Lamar and Rowe’s popularity and accomplishments, (b) the success of the Single ***before*** the Video’s release, (c) the success of many tracks on the Album other than the

Single, and (d) the Film's success, social and cultural impact, and use of the Single in its closing credits, all of which are indisputable. Plaintiff's causation theory is all the more speculative in light of the added uncertainty as to whether people who play the Video actually watch it instead of just listening to the audio, and, if they do watch, whether they do so until the final minute when the alleged use occurs. For all of these reasons, Plaintiff cannot come forth – as she must to meet her burden under the Copyright Act – with any non-speculative evidence of a causal nexus between the alleged infringement and any profits generated by the Single and Album, if any. Accordingly, Defendants are entitled to summary judgment on Plaintiff's claim for such profits. *See Mackie*, 296 F.3d at 916; *Complex Sys.*, 2013 WL 5970065, at *5.

II. PLAINTIFF'S CLAIM FOR INTEGRITY RIGHT AND REPUTATIONAL DAMAGES SHOULD BE DISMISSED AS A MATTER OF LAW

In addition to the indirect profits generated by the Single and Album, Plaintiff improperly seeks damages for alleged harm to her reputation. (AC at 19, ¶ C) Plaintiff predicates the latter request on the theory that the alleged infringement supposedly has damaged the “integrity of her work and her reputation as an artist”. (*Id.* ¶ 9) However, because the alleged infringement does not fall within the purview of the Copyright Act's limited moral rights provisions, the sole mechanism for copyright plaintiffs to recover such damages, Plaintiff's theory has no legal basis. The Court, therefore, should grant Defendants summary judgment on this damages claim.

Copyright plaintiffs generally are not entitled to reputational damages. The Second Circuit has long recognized that a copyright “plaintiff's legally protected interest is not . . . his reputation as a musician” or artist. *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946); *cf. Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (“the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation”). The only exception to this rule is for the narrowly circumscribed set of circumstances to which Congress has extended quasi-moral rights protection under the Visual

Artists Rights Act (“VARA”), codified in 17 U.S.C. § 106A. *See Bd. of Managers of SoHo Int’l Arts Condo. v. City of N.Y.*, No. 01 Civ. 1226, 2005 WL 1153752, at *1 n.3 (S.D.N.Y. Mar. 13, 2005) (“[m]oral rights claims to go to creators’ reputations, not to rights of economic exploitation”) (citing H.R. Rep. 101-514, 1990 U.S.C.C.A.N. 6915, 6932). In pertinent part, VARA creates a “right of integrity” that, among other things, allows an author of a work of visual art to prevent “any intentional distortion, mutilation, or other modification of [the author’s] work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right”. 17 U.S.C. § 106A(a)(3)(A). However, VARA has no application here.

The provisions of 17 U.S.C. § 106A, including subsection (a)(3)(A), are limited to circumstances in which a defendant uses or does something to the author’s actual work, and, therefore, do not apply when – as is the case here – a defendant allegedly depicts or otherwise copies the work. *See* 17 U.S.C. § 106A(c)(3) (“any reproduction, depiction, portrayal, or other use of a work is not a . . . distortion, mutilation, or other modification described in [§ 106A(a)(3)(A)].”). At least one commentator has noted that Congress intended this exclusion to apply to the very situation at issue in this case in which an audiovisual work allegedly embodies a work of visual art. *See* 5 William F. Patry, PATRY ON COPYRIGHT § 16:28 (2018) (“The House report indicates that the purpose of [§ 106A(c)(3)] is to ensure that works of visual art that are embodied in works such as audiovisual works, books, and periodicals are excluded from protection in order to ‘insulate’ copyright owners and users from liability.”) Because the premise of Plaintiff’s lawsuit is that the Video features an unauthorized “copy” of the Artwork, (AC ¶¶ 2, 10) (emphasis added), and Plaintiff does not and cannot allege that the Video uses the actual Artwork, she has no right to recover for any purported damages to the “integrity of her work and her reputation as an artist”. (*Id.* ¶ 9, at 19 ¶ C) Defendants, therefore, are entitled to summary judgment on Plaintiff’s claim for such damages.

CONCLUSION

For all of the reasons set forth herein, Defendants respectfully request that the Court grant

their motion for partial summary judgment and dismiss Plaintiff's claims for (i) disgorgement of profits generated by the Single and Album, if any; and (ii) damages for the supposed harm to the integrity of Plaintiff's work and her reputation as an artist.

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Respectfully submitted,

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