

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SID BERNSTEIN PRESENTS, LLC,

Plaintiff,

v.

APPLE CORPS LIMITED and
SUBAFILMS LIMITED,

Defendants.

Case No.: 16-cv-7084-GBD

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

ROBINS KAPLAN LLP

Paul V. LiCalsi
Michael A. Kolcun
601 Lexington Avenue, Suite 3400
New York, New York 10022
Telephone: (212) 980-7400
PLicalsi@RobinsKaplan.com
MKolcun@RobinsKaplan.com

*Attorneys for Defendants,
Apple Corps Limited and Subafilms Limited*

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Defendants Apple Corps Limited (“Apple”) and Subafilms Limited (“Subafilms”) (collectively, “Defendants”) respectfully submit this Memorandum of Law in support of their Motion to Dismiss the Complaint of Plaintiff Sid Bernstein Presents, LLC (“Plaintiff”), pursuant to Fed.R.Civ.P. 12(b)(6), and state as follows:

PRELIMINARY STATEMENT

This case is an entirely meritless attempt by the corporate successor of the promoter of The Beatles’ celebrated concert at Shea Stadium, Sid Bernstein, to claim over fifty years after-the-fact, that Bernstein was somehow an author and copyright owner of the film of that concert. This is in spite of the following facts:

First, Bernstein’s contract with The Beatles’ management company, Nems Enterprises, Ltd. (the predecessor-in-interest of Defendants Apple and Subafilms), explicitly provided that:

[Bernstein] agrees to exclude from the premises and particularly from the immediate vicinity of the stage and the backstage areas all TV cameras, and/or photographers with motion picture cameras and/or tape recorders **unless specifically authorized by [Nems] [Nems] shall have the sole and exclusive right to photograph, film, video-tape, and/or record the performance of THE BEATLES and the entire supporting show during this engagement and any receipts derived therefrom shall belong exclusively to [Nems].**

Second, Plaintiff admits that Bernstein had no control over or input into the filming of the concert or in the production of the resulting film, *The Beatles at Shea Stadium*.

Finally, Plaintiff admits that Bernstein, throughout the nearly fifty years after the Shea Stadium concert until his death in 2013, never asserted any claim of authorship or copyright ownership in the film of the concert – which first aired nationally in 1967 – despite the consistent, notorious, and exclusive claims of ownership by Nems, Apple, and Subafilms, all of which excluded Bernstein from any receipts from their various exploitations of the film.

As a matter of simple contract law, copyright law, and the application of the statute of limitations, Plaintiff – claiming to have received a general grant of Bernstein’s intellectual property rights – has brought an utterly frivolous claim for rights Bernstein never had. The Complaint should be dismissed in its entirety with prejudice.

STATEMENT OF FACTS

The following facts are premised on allegations in the Complaint which are deemed to be true solely for the purpose of this motion, and on documents incorporated by reference therein.

A. The Parties.

Defendants Apple Corps Limited and Subafilms Limited are in the music and entertainment business and were founded by the former members of The Beatles. *See* Compl. ¶¶ 2-3 (Dkt. 1).

In the 1960s, Sid Bernstein was a well-known and highly successful promoter of performances by many rock groups, musicians, and performers. *Id.* ¶¶ 9-10. In 2012, Bernstein assigned to Plaintiff “all of his intellectual property rights, including copyrights, including the right to sue for past, present and future infringements thereof.” *Id.* ¶ 8.

B. The Beatles’ Concert at Shea Stadium and the Attendant Contracts.

On April 26, 1965, Plaintiff alleges Bernstein entered into a contract for The Beatles “to perform at a concert” with Nems Enterprises, Ltd. (“Nems”), an entity controlled by The Beatles’ manager, Brian Epstein (“Nems-Bernstein Contract”). *Id.* ¶ 11. A true and correct copy of the Nems-Bernstein Contract is annexed as Exhibit A to the Declaration of Michael A. Kolcun (“Kolcun Decl.”) (submitted herewith). This contract provides that Bernstein was to furnish, *inter alia*, police protection, a sound system, lighting, a sound engineer, a stage, blockades, staff, a dressing room, and certain other accommodations for The Beatles’ concert. *See* Kolcun Decl.

Ex. A at *2-3. In return, Bernstein contracted for a generous percentage of the box office receipts of the concert. *Id.* at *1.

Filming the Shea Stadium concert was an entirely separate matter. Plaintiff admits that Bernstein agreed that Nems “had the right to film and record the performance of the Beatles and supporting acts during the concert.” Compl. ¶ 11. In fact, the Nems-Bernstein Contract expressly provided that Nems had the “sole and exclusive right” to do so, and thus, Bernstein was to exclude all cameras unless specifically authorized by Nems. *See* Kolcun Decl. Ex. A at *3. This contract also reserved all “receipts” derived from the filming exclusively to Nems. *Id.*

Plaintiff also admits that Nems hired Ed Sullivan’s company, Sullivan Productions, Inc. (“Sullivan Productions”), “to film and record the planned performance” at Shea Stadium, and admits Bernstein “knew of and approved the filming and recording of the performance by Mr. Sullivan’s crew.” Compl. ¶ 14. In doing so, Plaintiff references a work-for-hire agreement between Nems and Sullivan Productions dated August 12, 1965, providing that Nems maintained all rights, including copyright, in the film of the concert (“Nems-Sullivan Contract”). *Id.* ¶ 20. A true and correct copy of the Nems-Sullivan Contract is annexed as Exhibit B to the Kolcun Declaration. This contract provided that Sullivan Productions would, as an independent contractor, furnish to Nems a producer, director, cameraman, and all attendant services and personnel to film the Shea Stadium performance for the purpose of making a film of the concert. *See* Kolcun Decl. Ex. B at *1. The Nems-Sullivan Contract expressly provided that the film and all rights therein shall be Nems’ sole property, with Nems as the copyright proprietor. *Id.* at *4, 6. Plaintiff concedes Bernstein only “observed the filming and recording” of The Beatles’ concert, and further admits Bernstein never even had access to the so-called “Master Tapes” (*i.e.*, the raw film footage) of the concert. *See* Compl. ¶¶ 16, 36.

C. Nems, Apple, and Subafilms Openly and Continuously Assert Ownership of the Film.

It is undisputed that The Beatles' concert at Shea Stadium was historic. Plaintiff claims no rock group had ever performed at such a large venue, and that every one of the 55,000 seats at Shea Stadium was sold out. *Id.* ¶¶ 11-12. Plaintiff alleges Nems and Sullivan Productions shot and edited the raw footage of the concert to produce a film of The Beatles' performance entitled *The Beatles at Shea Stadium*. *Id.* ¶ 18. In January 1967, Nems arranged for a nationwide broadcast of the film on the ABC television network. *Id.* ¶ 19. Per the Nems-Sullivan Contract, the broadcast bore a copyright notice solely in the name of Nems. *See* Kolcun Decl. at Ex. C. Subsequently, Nems granted its copyright in *The Beatles at Shea Stadium* to Apple's subsidiary, Subafilms. *See* Compl. ¶ 20.

On March 18, 1988, copyright registration for *The Beatles at Shea Stadium* was obtained solely in Subafilms' name, designating the author of the motion picture as Nems as an employer-for-hire. *Id.* ¶ 21; *see also* Kolcun Decl. at Ex. D. Significantly, Plaintiff does not and cannot reasonably allege Bernstein was unaware of the airing of *The Beatles at Shea Stadium* on ABC in 1967, or of Subafilms' copyright registration.

Plaintiff readily admits that Apple and Subafilms has openly and continuously marketed, distributed, and sold various Beatles-related productions incorporating footage of the concert at Shea Stadium. *See, e.g.* Compl. ¶¶ 22-29, 35. While Plaintiff claims it only learned of these numerous exploitations as recently as 2015 and 2016, there is no allegation that Bernstein was unaware of any of their releases. *Id.* ¶¶ 30-35. In fact, Bernstein was alive until 2013, and generally granted his intellectual property rights by assignment to the Plaintiff corporation in 2012 shortly before his death. *Id.* ¶¶ 8-9.

Chronologically, the following form the basis of Plaintiff's claims of infringement.

1) *The Beatles Anthology.*

Plaintiff's first claims of infringement pertain to various audio and audiovisual compilations highlighting the entire span of The Beatles' career titled *The Beatles Anthology* (collectively, "*The Beatles Anthology*").

Plaintiff claims *The Beatles Anthology* was broadcast in November 1995 on ABC, depicting audiovisual footage of the Shea Stadium concert from either the finished film, *The Beatles at Shea Stadium*, or from the raw concert footage. *Id.* ¶¶ 22, 26. Plaintiff does not allege Bernstein received credit or identification as an author or copyright claimant in the broadcast, or any compensation whatsoever in connection with *The Beatles Anthology* at any time.

Plaintiff alleges *The Beatles Anthology* was released on CD in 1995, which included an audio recording of the song "Everybody's Trying to Be My Baby" (Volume Two, Track 13), which was derived from the raw footage of the concert. *Id.* ¶¶ 24, 26. On December 20, 1996, copyright registration for the full CD was obtained solely in the names of Apple and EMI Records, Ltd. *See* Kolcun Decl. at Ex. E. The physical packaging of the CD contains a clear copyright notice displaying the appropriate copyright symbol, release year, and sole names of Apple/EMI Records Ltd. as copyright claimants. *Id.* at Ex. F. Bernstein is not listed as an author or copyright claimant on the registration or packaging.

Plaintiff also claims *The Beatles Anthology* was released on VHS and Laserdisc in 1996, which incorporated audiovisual footage from the Shea Stadium concert. *See* Compl. ¶¶ 23, 26. On November 28, 1995, copyright registration for this audiovisual work was obtained solely in Apple's name. *See* Kolcun Decl. at Ex. G. On October 29, 1996, a second copyright registration for this audiovisual work (supplemented, eight-volume videocassettes) was obtained solely in Apple's name. *Id.* at Ex. H. The physical packaging of the videotapes contains a clear copyright notice displaying the appropriate copyright symbol, release year, and sole name of Apple as

copyright claimant. *Id.* at Ex. I. Again, Bernstein is not listed as an author or copyright claimant on either registration or packaging.

Plaintiff also asserts *The Beatles Anthology* was released on DVD in 2003, and similarly incorporated audiovisual footage from the concert. *See* Compl. ¶¶ 25-26. On October 6, 2003, copyright registration for this audiovisual work was obtained solely in Apple's name. *See* Kolcun Decl. Ex. J. The physical packaging of the DVD contains a clear copyright notice displaying the appropriate copyright symbol, release year, and sole name of Apple as copyright claimant. *Id.* at Ex. K. As before, Bernstein not is listed as an author or copyright claimant on the registration or packaging.

Finally, Plaintiff claims *The Beatles Anthology* (CD and DVD versions) is available for purchase on the beatles.com website, which is registered to Apple. *See* Compl. ¶ 27. Plaintiff also claims Apple and/or Subafilms contracted with eBay and Amazon to sell such products on their websites. *Id.*

2) The Billy Joel Movie.

Plaintiff alleges that, in 2010, Maritime Pictures LLC began showing a film documenting Billy Joel's concerts at Shea Stadium, which also included footage of The Beatles' concert ("Billy Joel Movie"). *Id.* ¶ 28. Plaintiff claims the Billy Joel Movie credits Apple for supplying footage of The Beatles' concert at Shea Stadium. *Id.* Plaintiff does not allege Bernstein received any credit or identification as an author or copyright claimant in the Billy Joel Movie, or compensation in connection with such use.

3) Online Streaming.

Plaintiff claims Apple and/or Subafilms streams footage from the Shea Stadium concert on the Internet via the beatles.com website. *Id.* ¶ 29. Apple's streaming of such footage credits and provides a clear copyright notice with the appropriate copyright symbol solely in the names

of Apple and Subafilms (and other of their related entities). *See* Kolcun Decl. Ex. L. Plaintiff does not allege Bernstein received any credit or identification as an author or copyright claimant in the streaming, or compensation in connection with such use.

4) The Documentary.

Plaintiff asserts that Apple announced a documentary directed by Ron Howard of The Beatles' concerts, *The Beatles: Eight Days a Week – The Touring Years* (“Documentary”), would be released on September 16, 2016. *See* Compl. ¶ 35. Plaintiff alleges the Documentary will include digitally-restored footage and remastered sound of The Beatles' concert at Shea Stadium. *Id.*

D. Plaintiff Seeks Copyright Registration for the Raw Footage of the Concert.

In July 2016, Plaintiff allegedly submitted an application to the Copyright Office for registration of ownership in the so-called “Master Tapes” – which Plaintiff apparently defines as the raw footage of The Beatles' Shea Stadium concert shot pursuant to the Nems-Sullivan Contract, which was edited to produce *The Beatles at Shea Stadium* film. *Id.* ¶¶ 16, 36. Plaintiff states its deposit copy accompanying the application consisted of photo frames from the finished film because neither Bernstein nor Plaintiff ever had access to the Master Tapes of the concert. *Id.* Plaintiff's application was refused because in an “adverse” situation, the Copyright Office will not accept a copy of an allegedly “infringing work” as deposit material. *Id.* ¶¶ 37-38.

E. The Complaint.

This litigation is premised on a claim that Bernstein, and thereby Plaintiff as his assignee, is the author and copyright owner of the “Master Tapes” and finished film, *The Beatles at Shea Stadium*. Plaintiff's theory is based on Bernstein's purported status as “employer” of The Beatles for their concert, and his so-called “creative contributions” to that concert. Plaintiff never alleges in the Complaint that Bernstein conducted or controlled, or had any right to

conduct or control, the filming of the concert. Indeed, the Complaint admits that Nems' contractor, Sullivan Productions, filmed The Beatles' concert.

Counts One and Two seek a declaratory judgment that Bernstein is the sole author, and Plaintiff the sole copyright owner, of the "Master Tapes" and finished film, as the latter is an allegedly unauthorized "derivative work" of the Master Tapes. Count Five seeks a declaration that Plaintiff's copyright application for the Master Tapes was proper, and it is entitled to copyright registration therein. In the alternative, Count Twelve seeks a declaratory judgment that Bernstein is a joint author, and Plaintiff a joint copyright owner, of the Master Tapes.

As a corollary to its copyright ownership claims, Plaintiff alleges the use of the Shea Stadium concert footage over the years constitutes infringement. Count Three seeks a declaratory judgment that the Documentary is an infringing "derivative work" and seeks copyright ownership in all portions therein which are derived from the "Master Tapes" and/or finished film. Count Four seeks a declaratory judgment of infringement with respect to the Billy Joel Movie. The remaining counts allege infringement for the numerous uses of the concert footage via (i) *The Beatles Anthology* (televised broadcast, CD, and DVD), (ii) the Billy Joel Movie, (iii) online streaming via the beatles.com website, and (iv) the Documentary.

STANDARD OF REVIEW

A complaint must be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure if the allegations, taken as true, do not demonstrate the plaintiff is entitled to relief. "If the allegations, for example, show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal." *Jones v. Bock*, 549 U.S. 199, 215 (2007).

Additionally, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). A plaintiff must plead "factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Factual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. In deciding a Rule 12(b)(6) motion, a court must “construe the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff’s favor.” *Aqua Creations USA Inc. v. Hilton Worldwide, Inc.*, 487 Fed.App’x 627, 628 (2d Cir. 2012). But, a court is not “bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions.” *Id.* at 629. Also, a “court need not accept as true an allegation that is contradicted by documents on which the complaint relies.” *Williams v. Citibank, N.A.*, 565 F.Supp.2d 523, 527 (S.D.N.Y. 2008).

In reaching its determination, a court is entitled to consider facts alleged in the complaint and documents attached or incorporated in it by reference, documents integral to the complaint and relied upon in it, and facts of which judicial notice may properly be taken, such as Copyright Office registration certificates. *See Heckman v. Town of Hempstead*, 568 Fed.App’x 41, 43 (2d Cir. 2014); *Island Software & Comp. Serv. v. Microsoft Corp.*, 413 F.3d 257, 261 (2d Cir. 2005).

ARGUMENT

Two points merit mentioning at the outset.

First, Plaintiff’s standing is premised on Bernstein’s alleged general assignment of “all of his intellectual property rights.” Compl. ¶ 8. The genesis of Plaintiff’s claims is the Nems-Bernstein Contract, which defined the parties’ respective roles with respect to the Shea Stadium concert. *Compare id.* ¶ 11, with Kolcun Decl. Ex. A. Neither Bernstein nor Plaintiff, however, was a party to this contract. Instead, Bernstein executed the Nems-Bernstein Contract on behalf of another company, Sid Bernstein Enterprises, Inc. Thus, but solely for the purpose of this motion, Apple and Subafilms will accept Plaintiff’s implication that Bernstein was the legal owner of this entity’s rights, such as they may have been, at the time of his assignment.

Second, as Bernstein’s assignee in 2012, Plaintiff is subject to the same defenses to which Bernstein would have been subjected had he brought these claims himself. *See, e.g.* N.Y. Gen. Oblig. Law § 13-105; *Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 416 (N.Y. 2010) (“Portfolio, as the assignee of Discover, is not entitled to stand in a better position than that of its assignor.”). For example, but without restriction, such defenses include the statute of limitations. *See, e.g. Affiliated FM Ins. Co. v. Liberty Mech. Contrs. Inc.*, 12-cv-5160, 2013 U.S. Dist. LEXIS 122030, at *25 (S.D.N.Y. Aug. 27, 2013) (“A successor-in interest like Greenwich Club, however, may still be subject to the same statute of limitations period as the initial owner.”).

I. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE COPYRIGHT ACT.

Plaintiff claims Bernstein was the author and copyright owner of the “Master Tapes” and *The Beatles at Shea Stadium* film because he was supposedly The Beatles’ “employer-for-hire” for their concert, and independently, due to his purported “creative contributions” to the concert. The allegations in the Complaint and documents incorporated therein, however, demonstrate that Plaintiff fails to state any legally cognizable claim under the Copyright Act.

A. Plaintiff’s Claims Are Conclusively Refuted by the Nems-Bernstein Contract.

In its decision in *Garcia v. Google, Inc.*, 786 F.3d 733, 743 (9th Cir. 2015), the Ninth Circuit stated: “The reality is that contracts and the work-for-hire doctrine govern much of the big-budget Hollywood performance and production world.” While *The Beatles at Shea Stadium* film is not so grandiose, hornbook contract law – entirely aside from the Copyright Act – still necessitates dismissal of this entire case.

Plaintiff’s claim of Bernstein’s purported authorship of the “Master Tapes” is entirely subject to the Nems-Bernstein Contract, as it established the parties’ respective roles regarding the concert. *Compare* Compl. ¶¶ 11-17, *with* Kolcun Decl. Ex. A. When deciding this motion,

the Court may refer to this contract since it is explicitly referenced in the Complaint, and because Bernstein would have had no involvement with the concert absent this agreement.

“When interpreting a contract under New York law, the intention of the parties should control.” *Gary Friedrich Enters., LLC v. Marvel Characters, Inc.*, 716 F.3d 302, 313 (2d Cir. 2013) (internal notations omitted). The “best evidence of the parties’ intent is the language used in their contract.” *TCA TV Corp. v. McCollum*, 16-cv-134, 2016 U.S. App. LEXIS 18333, at *46 (2d Cir. Oct. 11, 2016) (affirming dismissal under Rule 12(b)(6) when plaintiffs failed to plausibly allege valid copyright interest).

To determine the parties’ intent with respect to the *filming* of the Shea Stadium concert (*i.e.*, the creation of the raw footage and eventual finished film), the Court need look no further than the third page of the Nems-Bernstein Contract to resolve this entire dispute. There, Bernstein expressly agreed:

... to exclude from the premises and particularly from the immediate vicinity of the stage and the backstage areas all TV cameras, and/or photographers with motion picture cameras and/or tape recorders unless specifically authorized by [Nems] [Nems] shall have the sole and exclusive right to photograph, film, video-tape, and/or record the performance of THE BEATLES and the entire supporting show during this engagement and any receipts derived therefrom shall belong exclusively to [Nems].

Kolcun Decl. Ex. A at *3.

Without ambiguity, the Nems-Bernstein Contract thus demonstrates the parties intended Bernstein to have no role whatsoever in filming the concert, which in fact, was to be filmed to his exclusion. See *Gary Friedrich*, 716 F.3d at 313 (contract language is unambiguous if it has “a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion.”).

Therefore, the Court may not look outside this contract, or accept as true any of Plaintiff's allegations to the contrary that Bernstein is entitled to claim authorship and ownership to the film footage which captured the events at Shea Stadium, since they are expressly contradicted by documents on which the complaint relies. Instead, the Nems-Bernstein Contract, which is integral to and explicitly referenced in the pleading, controls. *See Rapoport v. Asia Elecs. Holding Co.*, 88 F.Supp.2d 179, 184 (S.D.N.Y. 2000) ("If these documents contradict the allegations of the amended complaint, the documents control and this Court need not accept as true the allegations in the amended complaint.").

Frankly, Plaintiff's attempt to claim authorship and copyright ownership of a motion picture that its predecessor-in-interest expressly agreed not to film is ludicrous. "[A]s with all contract matters, the parties may minimize subsequent disputes by formalizing their agreement in a written contract." *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991). Because Plaintiff's "allegations are contradicted by [this] document, those allegations are insufficient to defeat a motion to dismiss." *Matusovsky v. Merrill Lynch*, 186 F.Supp.2d 397, 400 (S.D.N.Y. 2002).

B. The Film Was Not a Work-for-Hire at Bernstein's Instance and Expense.

Plaintiff's fleeting reference in the Complaint to the work-for-hire doctrine should be recognized for what it is – a red herring. This is true even if the Court could ignore the explicit, legal effect of the Nems-Bernstein Contract.

Plaintiff claims Bernstein was the "employer-for-hire" of The Beatles' concert performance, and apparently for that reason, that he was the copyright owner of the raw footage and finished film as works-for-hire. *See* Compl. ¶¶ 41, 94. But Plaintiff does not allege that either the raw footage or finished film were Bernstein's works-for-hire; rather, only that "[Bernstein] hired the Beatles and a complete supporting show to perform at a concert to be

presented by Sid at Shea Stadium on August 15, 1965.” *Id.* ¶ 11 (emphasis supplied). Plaintiff’s attempt to conflate the event of the concert with the filming of the concert is unavailing.

Copyright only attaches to works fixed in a tangible medium of expression, and the Nems-Bernstein Contract conclusively establishes that Nems exclusively controlled the filming and exclusively owned the resulting work. *See Floral v. Cal. Artificial Flower Co.*, 201 F.Supp. 287, 289 (S.D.N.Y. 1962) (“The work must be in the form of a ‘writing,’ i.e., it must be fixed in some tangible form...”); *see also* 17 U.S.C. § 102(a). The Beatles’ performance is not a work fixed in some tangible form – the motion picture capturing the performance is such a work, the creation of which was exclusively reserved to Nems. As a matter of law, the “copyright belongs to the person at whose ‘instance and expense’ the work is created.” *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 634-35 (2d Cir. 2004) (emphasis supplied). Plaintiff’s “performance-for-hire” claim is not cognizable under the Copyright Act.

Since the film was fixed in a tangible medium before January 1, 1978, it is subject to analysis under the 1909 Copyright Act. *See* 17 U.S.C. § 301(b)(2); *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 553 (2d Cir. 1995). Applying the instance and expense test to the allegations in the Complaint not only reveals that Plaintiff fails to plausibly allege the film was created at Bernstein’s instance and expense, but that it was actually a work-for-hire for Nems.

The term “instance” means “the extent to which the hiring party provided the impetus for, participated in, or had the power to supervise the creation of the work.” *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 139 (2d Cir. 2013); *see also Martha Graham*, 380 F.3d at 635 (“A work is made at the hiring party’s ‘instance and expense’ when the employer induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out.”).

The Second Circuit reasons this is met “when the motivating factor in producing the work was the employer who induced the creation.” *Playboy*, 53 F.3d at 554 (quotation omitted). Even accepting the allegation that Bernstein “hired” The Beatles in some capacity, Plaintiff fails to satisfy this “instance” element because, as described above, it only alleges Bernstein hired the Beatles “to perform at a concert” – not to create the work at issue (the film of this event).

Compl. ¶ 11. Plaintiff never alleges Bernstein induced the creation of the film, which, of course, is refuted by the two applicable contracts. Nor did Bernstein have any supervisory authority over the creation of the work, as he was expressly excluded from filming. Plaintiff fails to satisfy this “essential element” of the test. *Playboy*, 53 F.3d at 554.

Plaintiff is similarly unsuccessful with the “expense” component of the inquiry, which “refers to the resources the hiring party invests in the creation of the work.” *Kirby*, 726 F.3d at 139. Again, Plaintiff does not allege Bernstein made any expenditure for the film. Instead, Plaintiff concedes The Beatles’ manager, on behalf of Nems, “arranged for Mr. Sullivan’s camera crew to film and record the planned performance” to create the film. Compl. ¶ 14. Indeed, the Nems-Sullivan Contract provides that Sullivan Productions – for a fee paid by Nems – would furnish a producer, director, cameraman, and all attendant services and personnel to create the film. *See* Kolcun Decl. Ex. B at *1. It is also notable that Bernstein had no investment connected to the film’s receipts, as he was only compensated from the box office receipts for the concert. *Id.* Ex. A at *1. On the other hand, the film’s receipts were expressly reserved exclusively for Nems under the Nems-Bernstein Contract. *Id.* at *3. The “expense” component “properly reward[s] with ownership the party that bears the risk with respect to the work’s success.” *Urbont v. Sony Music Entm’t*, 15-cv-1778, 2016 U.S. App. LEXIS 13775, at *20 (2d Cir. July 29, 2016). When it comes to the film, Bernstein simply had no skin in the game.

In any event, even if Plaintiff could plausibly allege Bernstein's hiring of The Beatles to perform at Shea Stadium was the same as hiring them to create the film of that concert, Bernstein still would not qualify as its author, or Plaintiff as its copyright owner, because of the explicit provisions of the controlling contracts. Less than three months ago, the Second Circuit reaffirmed the basic principle that "an 'employer' who hires another to create a copyrightable work is the 'author' of the work for purposes of the statute, absent an agreement to the contrary." *Id.* at *18-19 (quoting *Playboy*, 53 F.3d at 554) (emphasis supplied). As explained, the Nems-Bernstein Contract and the Nems-Sullivan Contract are precisely the types of "agreements to the contrary" entered into before, or contemporaneously with, the work that preclude Plaintiff's claims.

C. The "Master Tapes" of the Concert Are Not Independently Copyrightable.

Employing another meritless ground, the Complaint attempts to attack Subafilms' copyright registration of the film *The Beatles at Shea Stadium* by claiming Plaintiff owns the copyright to the "Master Tapes" – *i.e.*, the raw footage from which the finished film was created. While there is no basis for Plaintiff's position given the explicit reservation of film rights in the parties' contract, these claims should be dismissed for two additional reasons.

First, it is well-established that registration of a work instills the owner with all rights to its underlying parts. Just last year, this Court held that registration of the final version of a record album was sufficient, with respect to unpublished recordings attendant to that album, to demonstrate that the owner also "owns the copyrights to the unpublished works as 'derivative' or 'underlying' parts" therein. *Mahan v. Roc Nation, LLC*, 14-cv-5075, 2015 U.S. Dist. LEXIS 49684, at *12 (S.D.N.Y. April 15, 2015), *aff'd*, 634 Fed.Appx. 329 (2d Cir. 2016). It reasoned that "[c]ourts have consistently rejected the notion that a copyright owner is required to separately register every draft or version of an evolving work, as such a requirement would be

wasteful and impractical.” *Id.* (quoting *Peterson v. Kolodin*, 13-cv-793, 2013 U.S. Dist. LEXIS 132940, at *19 (S.D.N.Y. Sept. 10, 2013)) (internal notations omitted). Therefore, and as a matter of law, Subafilms’ registration of the finished film includes all of its constituent parts (*i.e.*, the so-called “Master Tapes”) as a unified whole. *See Peterson*, 2013 U.S. Dist. LEXIS 132940, at *19 (“even if ... the intermediate ‘rough cut’ of the Peterson-Kole recordings and/or the final version somehow qualify as derivative works distinct from the original unedited takes, plaintiffs’ registration of the final version is still sufficient...”); *New York Chinese TV Programs, Inc. v. U.E. Enters.*, 88-cv-4170, 1989 U.S. Dist. LEXIS 2760, at *15 (S.D.N.Y. March 8, 1989).

Moreover, Plaintiff admits the “Copyright Office indicated that [its] claim of copyright in the Master Tapes was adverse to the 1988 registration of copyright by Subafilms in the Movie” when it refused registration. Compl. ¶ 37. In *Garcia v. Google*, the Ninth Circuit reasoned that “when ‘the question as to copyrightability forms the core of the dispute between the parties, input from the Copyright Office—the governmental agency that possesses special expertise in determining the bounds of copyright protection—can be of great value.’” 786 F.3d at 742, n.7 (quoting 2 Nimmer on Copyright § 7.16[B][3][b][vi]). Thus, this Court should also defer to the Copyright Office in rejecting Plaintiff’s attempted piecemeal treatment of the copyright in the finished film, *The Beatles at Shea Stadium*.

D. Bernstein Was Not an Author of the Film.

Plaintiff claims Bernstein’s purported “creative contribution” to the Shea Stadium concert somehow translates to authorship and copyright ownership, or co-authorship and co-ownership, of the separate film of that event. Plaintiff, however, still fails to plausibly plead that Bernstein

was either the “dominant” or a “joint” author of the film, or that he made any copyrightable contributions to it.¹

1) Bernstein Was Not the Dominant Author of the Film.

In its decision in *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court identified an author as “he to whom anything owes its origin; originator; maker...” 111 U.S. 53, 58 (1883). The Court further explained that authorship “involves originating, making, producing, as the inventive or master mind.” *Id.* at 61. As set forth above, Plaintiff concedes that Bernstein’s “creative contributions” were actually restricted to arrangements for the Shea Stadium concert, as opposed to the filming, production, and creation of the film. “In the absence of contract, the copyright remains with the one or more persons who created copyrightable material.” *Childress*, 945 F.2d at 507. Plaintiff does not (and cannot) allege that Bernstein created or was the originator of the film, and moreover, the applicable contracts explicitly refute such a notion. Subafilms’ copyright registration also rebuts such a conclusion. *See Boisson v. Banian, Ltd.*, 273 F.3d 262, 268 (2d Cir. 2001) (“certificates of registration constitute prima facie evidence of the validity not only of their copyrights, but also of the originality of their works.”).

Furthermore, when “multiple individuals lay claim to the copyright in a single work, the dispositive inquiry is which of the putative authors is the ‘dominant author.’” *16 Casa Duse*, 791 F.3d at 260 (citing *Childress*, 945 F.2d at 508). While no formal rules exist in the Second Circuit to determine dominance, certain factors such as decision-making authority, billing, and written agreements with third-parties are relevant to this inquiry. *Id.* (citing *Thomson v. Larson*, 147 F.3d 195, 202-04 (2d Cir. 1998)).

¹ Plaintiff’s apparent reliance on the “dominant author” analysis in *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247 (2d Cir. 2015) is also likely misplaced because that case involved a motion picture fixed after January 1, 1978, and thus, it was subject to the 1976 Copyright Act. The Second Circuit made no indication that its holding displaced questions of authorship under the 1909 Copyright Act.

Decision-making authority refers to the “relative control ‘over what changes are made and what is included in a work.’” *Id.* (citing *Thomson*, 147 F.3d at 203). The Nems-Bernstein Contract demonstrates that Bernstein had no right to film the concert and that he was expressly excluded from doing so. *Compare Thomson*, 147 F.3d at 203 (relying on contract to determine decision-making authority). The Complaint and documents incorporated therein also confirm that, *inter alia*, Bernstein in fact did not arrange or control the filming of the concert, and that Nems did so. *Compare 16 Casa Duse*, 791 F.3d at 260.

The way the parties bill or credit themselves also provides a “window on the mind of the party who is responsible for giving the billing or the credit.” *Thomson*, 147 F.3d at 203. Plaintiff does not allege Bernstein received any billing or credit on the film *The Beatles at Shea Stadium* when it first aired on ABC in 1967, or at any time thereafter. Significantly, the original credits on the film unequivocally stated that Nems was the sole owner of the copyright. On the other hand, the credits merely acknowledge that “The Beatles appeared at Shea Stadium under the auspices of Sid Bernstein.” *See* Kolcun Decl. Ex. M (emphasis supplied). Nor did Bernstein receive any credit on the various uses of the film Plaintiff complains of.

Finally, written agreements with outsiders also demonstrate that Bernstein was not the author of the film. The Nems-Sullivan Contract demonstrably establishes that Nems induced the creation of the film by contracting with and compensating Sullivan Productions to shoot, direct, and produce it. Thereby, Nems acquired the copyright to the film. *Compare 16 Casa Duse*, 791 F.3d at 261 (“Casa Duse also entered into an agreement with the screenwriter, authorizing the very creation of the film ... Thus Casa Duse executed all of the relevant third-party agreements.”) (emphasis in original). Plaintiff fails to plausibly allege that Bernstein was the dominant author of the film, whether one considers the raw footage shot by Nems’ contractor, or the finished film.

2) Bernstein Was Not a Joint Author of the Film.

“A co-authorship claimant bears the burden of establishing that each of the putative co-authors (1) made independently copyrightable contributions to the work; and (2) fully intended to be co-authors.” *Thomson*, 147 F.3d at 200 (citing *Childress*, 945 F.2d at 507-08). The Second Circuit noted this test was to be utilized “in the absence of contractual arrangements concerning listed authorship...” *Childress*, 945 F.2d at 508 (emphasis supplied). Thus, the test is only applicable “where the parties have failed to sign any written agreement.” *Thomson*, 147 F.3d at 200 (citing *Childress*, 945 F.2d at 501).

As before, the Nems-Bernstein Contract is dispositive. *Compare Gilliam v. ABC*, 538 F.2d 14, 22 (2d Cir. 1976) (finding a reservation of rights provision “suggests that the parties did not consider themselves joint authors of a single work.”). Because this documentary evidence clearly contradicts Plaintiff’s allegations – made on information and belief – that both (or even either) of the parties thereto intended to be joint authors of the film, this Court cannot accept Plaintiff’s allegations as true. Furthermore, the foregoing analysis concerning decision-making authority, billing, and written agreements is similarly controlling. *See Thomson*, 147 F.3d at 202-04.

3) Bernstein’s “Creative Contributions” to the Shea Stadium Event Do Not Result in Copyright of the Film.

Plaintiff claims Bernstein’s alleged “creative contributions” to the event of the Shea Stadium concert somehow afford authorship and copyright ownership of the separate film. But without a single allegation of contribution to the actual work at issue (*i.e.*, the film), Plaintiff’s theory is rendered even more farfetched than the actress’ rejected claim of copyright in her “fleeting performance” in the Ninth Circuit’s *Garcia* decision, and the film director’s rejected claim in the Second Circuit’s *16 Casa Duse* decision. *See Garcia*, 786 F.3d at 737; *16 Casa*

Duse, 791 F.3d at 251. Plaintiff's suggestion is far worse; it would otherwise enable copyright claims from individuals who contribute absolutely nothing to the work at issue.

A motion picture has contributions from many individuals which ultimately merge to create a unitary whole. *See 16 Casa Duse*, 791 F.3d at 257. “[N]on-freestanding contributions to works of authorship are not ordinarily themselves works of authorship.” *Id.* In holding a film director did not possess copyright in his contributions to a film, the Second Circuit reasoned, “[f]ilmmaking is a collaborative process typically involving artistic contributions from large numbers of people...” *Id.* at 258. The Ninth Circuit likened a similar claim by a film actress to her performance as “‘copyright cherrypicking,’ which would enable any contributor from a costume designer down to an extra or best boy to claim copyright...” *Garcia*, 786 F.3d at 737. Bernstein's alleged role, taken as true, was even less instrumental to the film than these examples.

Plaintiff also fails to state a claim for the second reason the Second and Ninth Circuits identified in those decisions – Bernstein never fixed the Shea Stadium concert in a tangible medium. *See 16 Casa Duse*, 791 F.3d at 258; *Garcia*, 786 F.3d at 743-44. “Authors are not entitled to copyright protection except for ‘works of authorship’ they create and fix.” *16 Casa Duse*, 791 F.3d at 258; *see also Cmty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (“the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”). Plaintiff's allegation of Bernstein's contribution in promoting the ephemeral Shea Stadium performance is not enough; he never fixed the concert in a tangible medium, and was actually excluded by contract from doing so. Given its own allegations, Plaintiff cannot plausibly claim *The Beatles at Shea*

Stadium, or the raw footage it incorporated, were fixed “by or under the authority” of Bernstein. *See Garcia*, 786 F.3d at 744 (quoting 17 U.S.C. § 101).

II. PLAINTIFF’S CLAIMS MUST BE DISMISSED AS TIME-BARRED.

At their core, Plaintiff’s claims concern whether Bernstein’s purported contribution to the Shea Stadium concert was “significant enough to qualify [him] as the author and therefore owner of the copyright” in the film of the concert. *Kwan v. Schlein*, 634 F.3d 224, 229 (2d Cir. 2011); *see also* Compl. ¶¶ 40-60, 65-67, 91-99 (Counts One, Two, Three, Five, and Twelve). This dispute “does not involve the nature, extent or scope, of copying, and therefore, ownership forms the backbone” of this action. *Kwan*, 634 F.3d at 229. Because copyright ownership is contested, it is considered the *gravamen* of this dispute to which the Copyright Act’s three-year statute of limitations is applied, even though the Complaint also includes infringement claims. *See Ortiz v. Guitian Bros. Music Inc.*, 07-cv-3897, 2008 U.S. Dist. LEXIS 75445, at *6-7 (S.D.N.Y. Sept. 29, 2008); *see also Kwan*, 634 F.3d at 229.

The Second Circuit noted in *Kwan* that an “ownership claim accrues only once, when ‘a reasonably diligent plaintiff would have been put on inquiry as to the existence of a right.’” 634 F.3d at 228. “Under this rubric, any number of events can trigger the accrual of an ownership claim, including an express assertion of sole authorship or ownership.” *Id.* An “express assertion of adverse ownership or a plain and express repudiation of plaintiff’s ownership such as registering the copyright in defendant’s own name, distributing the work with copyright notice identifying defendant as the owner, or exploiting the work for years without paying royalties to plaintiff will trigger the accrual of the statute of limitations.” *Brand v. RMM*, 10-cv-287, 2011 U.S. Dist. LEXIS 42599, at *12-13 (S.D.N.Y. April 18, 2011) (internal notations omitted); *see also Mahan v. Roc Nation, LLC*, 14-cv-5075, 2015 U.S. Dist. LEXIS 49684, at *6-7 (S.D.N.Y.

April 15, 2015), *aff'd*, 634 Fed.App'x 329 (2d Cir. 2016). If suit is not brought within three years of accrual, the complaint is time-barred and must be dismissed. *See* 17 U.S.C. § 507(b).

In copyright ownership cases, dismissal pursuant to the statute of limitations “promotes the principles of repose integral to a properly functioning copyright market.” *Merchant v. Levy*, 92 F.3d 51, 57 (2d Cir. 1996). Dismissal also advances “Congress’ paramount goal in revising 1976 [Copyright] Act [by] enhancing predictability and certainty of copyright ownership.” *Reid*, 490 U.S. at 749. The Second Circuit consistently adheres to these policies by affirming Rule 12(b)(6) dismissals for failing to assert a claim of copyright ownership within three years of accrual. *See, e.g. Simmons v. Stanberry*, 810 F.3d 114 (2d Cir. 2016); *Kwan*, 634 F.3d at 228-30; *Parks v. ABC*, 341 Fed.App'x 737 (2d Cir. 2009); *Merchant*, 92 F.3d at 56-57; *see also Seven Arts Filmed Entm't Ltd. v. Content Media Corp.*, 733 F.3d 1251 (9th Cir. 2013).

In obvious apprehension of a challenge to its stale claims, Plaintiff alleges it only learned of the copyright registration for the film, and its various publications and exploitations, as recently as 2015 and 2016. *See* Compl. ¶¶ 29-35. These are attorney-manufactured allegations which can be easily discarded. As noted above, Plaintiff is subject to the same defenses its assignor would have been subject to had he brought such claims, including the statute of limitations. The Complaint conclusively establishes that such claims accrued many decades ago with the airing of *The Beatles at Shea Stadium* in 1967, the registration of Subafilms’ copyright in 1988, and Bernstein’s exclusion from income from the film’s exploitations for decades.

A. Copyright Registration of the Film Alone Triggered the Statute of Limitations.

When a party claims ownership by registering a copyright, such “[r]ecordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document.” 17 U.S.C. § 205(c). Thus, “the three-year statute of limitations begins to run when a copyright certificate listing defendants as authors is filed.” *Mahan*, 2015 U.S. Dist.

LEXIS 49684, at *7-8 (internal notations omitted) (quoting *Margo v. Weiss*, 96-cv 3842, 1997 U.S. Dist. LEXIS 20867 (S.D.N.Y. Jan. 5, 1998), *aff'd*, 213 F.3d 55, 59 (2d Cir. 2000)). This Court routinely relies on publicly-filed copyright registrations to bar stale ownership claims. *See, e.g., id.*; *Complex Sys. v. ABN AMBRO Bank N.V.*, 979 F.Supp.2d 456, 472 (S.D.N.Y. 2013) (copyright ownership claim time-barred as “the duly issued copyright registration put the world on constructive notice of CSI’s copyright”); *Brand*, 2011 U.S. Dist. LEXIS 42599, at *13-15.

Subafilms obtained copyright registration for the film on March 18, 1988. *See* Kolcun Decl. at Ex. D. Along with the rest of the world, Plaintiff’s predecessor-in-interest had notice of Subafilms’ claim of sole ownership by virtue of this publicly-filed registration. Plaintiff’s predecessor Bernstein was required to bring an ownership claim no later than March 18, 1991. Because Bernstein failed to do so, all of Plaintiff’s claims are time-barred and must be dismissed.

B. Copyright Notices and a Lack of Royalties Triggered the Statute of Limitations.

This Court frequently holds that the public release and distribution of material bearing copyright notices in a defendant’s name, and excluding other claimants, is sufficient notice to commence the three-year limitations period. *See, e.g. Mahan*, 2015 U.S. Dist. LEXIS 49684, at *8-9; *Brand*, 2011 U.S. Dist. LEXIS 42599, at *13-15; *Ortiz*, 2008 U.S. Dist. LEXIS 75445, at *8-9. In particular, this Court finds that commercial releases of a DVD or CD with copyright notices on the back cover provide such notice. *See Ortiz*, 2008 WL 4449314, at *3-4. This means that a plaintiff alleging copyright ownership “reasonably should have know[n] of the injury upon which his claim [was] premised.” *Brand*, 2011 U.S. Dist. LEXIS 42599, at *14.

As in those cases, each of the various alleged exploitations of the film footage of The Beatles’ concert was accompanied by a copyright notice listing Apple as the copyright owner. For example, *The Beatles Anthology* releases on CD, video, and DVD were all accompanied by such notices, which Plaintiff concedes were released in 1995, 1996, and 2003, respectively. *See*

Compl. ¶¶ 23-25; Kolcun Decl. Ex. F, I, K. Independently, copyright registrations were also obtained for each such rendition. *See* Kolcun Decl. at Ex. E, G, H, J. Thus, a reasonably diligent person would have examined these copyright notices and promptly raised any genuine concerns with Apple and/or Subafilms.

Moreover, The Beatles' concert at Shea Stadium was an indisputably historic event, and Plaintiff goes great lengths to reference the ongoing commercialization of the film of that concert for the last five decades. *See, e.g.* Compl. ¶¶ 11-12, 19, 28-29, 35. Indeed, Plaintiff alleges the film was first broadcast nationwide in 1967. This bore a copyright notice exclusively in Nems. Again, Plaintiff concedes the film was supplied for the Billy Joel Movie in 2010 with credit solely to Apple. Plaintiff also admits the film was used in conjunction with streaming *The Beatles Anthology*, separately streamed on Apple's website, and its use by Apple through the present day by way of the Documentary, all of which solely credit ownership to Apple.

This extensive exploitation and commercial success underscores that Plaintiff (and its predecessor-in-interest) could not have plausibly been unaware of these various exploitations, and thus, Bernstein's purported entitlement to royalties. This is especially true considering the allegations in the Complaint of Bernstein's sophistication and experience in the music industry. *Id.* ¶¶ 9-10. As a result, Plaintiff is deemed to have knowledge of the claims of sole copyright ownership by Apple, Subafilms, and their predecessor Nems, and thus, the existence of its own purported claims long before three years of initiating suit in 2016. *See Mahan*, 2015 U.S. Dist. LEXIS 49684, at *9; *Brand*, 2011 U.S. Dist. LEXIS 42599, at *14-15; *Ortiz*, 2008 U.S. Dist. LEXIS 75455, at *10-11.

III. PLAINTIFF'S INFRINGEMENT CLAIMS SHOULD ALSO BE DISMISSED.

To establish copyright infringement, a plaintiff must show (1) a valid copyright in the work allegedly infringed, and (2) infringement by violation of one of the exclusive rights

bestowed upon the owner. *See Island Software*, 413 F.3d at 260. As established above, Plaintiff fails to state a claim of infringement because it cannot plead ownership of a valid copyright.

Plaintiff's infringement claims are likewise time-barred. As the Second Circuit held in *Kwan*, "[w]here, as here, the ownership claim is time-barred, and ownership is the dispositive issue, any attendant infringement claims must fail." 634 F.3d at 230. The Second Circuit reaffirmed this rule just ten months ago, reasoning that a plaintiff cannot "revive the time-barred claim of ownership of a copyright interest by relying on the defendants' continued exploitation of the copyright within three years of his filing suit." *Simmons*, 810 F.3d at 116. Plaintiff's infringement claims must be dismissed as well.

CONCLUSION

For the foregoing reasons, Defendants Apple Corps Limited and Subafilms Limited respectfully request the Court dismiss the Complaint in its entirety with prejudice, award their reasonable attorneys' fees and costs, and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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ROBINS KAPLAN LLP

By: s/ Michael A. Kolcun

Paul V. LiCalsi
Michael A. Kolcun
601 Lexington Avenue, Suite 3400
New York, New York 10022
Telephone: (212) 980-7400
PLicalsi@RobinsKaplan.com
MKolcun@RobinsKaplan.com

*Attorneys for Defendants,
Apple Corps Limited and Subafilms Limited*