

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

ANDY STONE, et al.,  
Plaintiffs,  
v.  
MARIAH CAREY, et al.,  
Defendants.

Case No. 2:23-cv-09216-MRA-JDE  
**ORDER GRANTING DEFENDANTS’  
MOTION FOR SUMMARY  
JUDGMENT [ECF 68], DENYING  
PLAINTIFFS’ MOTION FOR  
SUMMARY JUDGMENT [ECF 69],  
AND GRANTING DEFENDANTS’  
MOTION FOR SANCTIONS [ECF 74]**

Before the Court are Defendants’ and Plaintiffs’ Motions for Summary Judgment and Defendants’ Motion for Sanctions. ECF 68, 69, 74. The Court read and considered the moving, opposing, and reply papers and held a hearing. ECF 80. For the reasons stated herein, the Court **GRANTS** Defendants’ Motion for Summary Judgment and Motion for Sanctions and **DENIES** Plaintiffs’ Motion for Summary Judgment.

**I. BACKGROUND**

On November 1, 2023, Plaintiffs Andy Stone, whose stage name is Vince Vance, and Troy Powers filed this copyright infringement action against Defendants Mariah Carey (“Carey”), Walter Afanasieff (“Afanasieff”), Sony/ATV Tunes LLC, Sony Entertainment, Kobalt Music Publishing America, Inc., Universal Music Corporation, and Wally World

1 Music LLC (collectively, “Defendants”). ECF 1. In the operative First Amended  
2 Complaint (“FAC”), Plaintiffs allege that they co-authored in 1988 and released in 1989 a  
3 musical composition entitled “All I Want for Christmas Is You” (“*Vance*”), in which they  
4 purportedly own copyright interest. ECF 31 ¶¶ 5, 6, 18. In 1994, Defendants Carey and  
5 Afanasieff co-authored and released a musical composition by the same name (“*Carey*”)  
6 to great commercial success. *Id.* ¶¶ 31, 35, 37-45. Plaintiffs allege that Carey and  
7 Afanasieff had access to *Vance* prior to writing and releasing *Carey* and copied *Vance*’s  
8 lyrics, compositional structure, chord progression, melody, and harmony. *Id.* ¶¶ 29-30, 32,  
9 34, 48, 49, 59. On these allegations, Plaintiffs bring a single claim of direct copyright  
10 infringement. *Id.* ¶¶ 60-70.

11 On February 2, 2024, Defendants filed an unopposed Motion for an Order  
12 Establishing an Initial Expert Phase as to the Extrinsic Test. ECF 41 through ECF 45. In  
13 their Joint Rule 26(f) Report, the parties agreed that the principal issue in this case is  
14 “whether [*Carey*] and [*Vance*] are substantially similar under this Circuit’s extrinsic test  
15 for substantial similarity in protected expression.” ECF 46 at 4. Consistent with  
16 Defendants’ Motion, the parties stipulated to an initial phase of expert discovery as to the  
17 extrinsic test and stay of all other discovery. *Id.* at 6. The parties also agreed that this  
18 discrete, dispositive issue should be decided by motions for summary judgment. *Id.* at 6-  
19 7. On March 8, 2024, the Court granted the request and issued its Order establishing an  
20 initial expert phase as to the extrinsic test (the “Bifurcation Order”). ECF 53. The Court  
21 ordered the parties to exchange initial and rebuttal expert disclosures and complete expert  
22 discovery as to the extrinsic test and, upon completion of expert discovery, to file a joint  
23 status report advising whether any party intended to file a motion for summary judgment.  
24 *Id.* at 3. The Court stayed all other discovery. *Id.*

25 Pursuant to the Court’s Bifurcation Order, the parties completed expert discovery as  
26 to the extrinsic test. Defendants designated Dr. Lawrence Ferrara and Prof. Nathaniel  
27 Lewis as their experts and served initial and rebuttal reports from both experts. *See* ECF  
28 68-3 (Ferrara Decl.) ¶¶ 3, 5-6, Exs. 1 (ECF 68-6), 2 (ECF 68-7), 3 (ECF 68-8); ECF 68-4

1 (Lewis Decl.) ¶¶ 4-6, Exs. 4 (ECF 68-9), 5 (ECF 68-10), 6 (ECF 68-11). Plaintiffs  
2 designated Dr. Matthew Sakakeeny and Prof. Robert W. Fink as their experts and served  
3 on Defendants initial reports from both experts. See ECF 73-3 (Fink Decl.) ¶ 3, Ex. 2;<sup>1</sup>  
4 ECF 73-4 (Sakakeeny Decl.) ¶ 2, Ex. 3. Plaintiffs did not serve any rebuttal expert  
5 disclosures or expert rebuttal reports. ECF 68-5 (Lamm Decl.) ¶ 6. The parties took the  
6 depositions of Ferrara, Lewis, Sakakeeny, and Fink. *Id.* ¶¶ 8-11, Exs. 9-13; ECF 73-2 (Fox  
7 Decl.) ¶¶ 10-13, Exs. 6-9. The parties filed a Joint Status Report on July 8, 2024, in which  
8 Defendants averred that they intended to file an early motion for summary judgment as to  
9 the extrinsic test. ECF 64 at 2. Plaintiffs proffered that they intended to file “a motion.”  
10 *Id.* On July 10, 2024, the Court set a briefing schedule on the motions. ECF 65.

11 On August 12, 2024, the parties timely filed Motions for Summary Judgment.  
12 ECF 68, 69. Defendants’ Motion argues that there is no genuine dispute that Plaintiffs’  
13 claimed similarities between *Carey* and *Vance* are not protectable expression under the  
14 extrinsic test, or as a selection and arrangement of unprotectable elements. ECF 68 at 3-4.  
15 Plaintiffs’ Motion argues that Plaintiffs are entitled to summary judgment on its copyright  
16 claims.<sup>2</sup> ECF 69 at 2, 10-18; ECF 69-5. The parties filed Oppositions on September 23,  
17 2024, and Replies on October 15, 2024. ECF 72, 73, 76, 77.

18 On October 13, 2024, Defendants file their Motion for Sanctions, requesting  
19 sanctions against Plaintiffs over the filing of their Motion for Summary Judgment. ECF  
20 74 at 3. Plaintiffs filed an Opposition to the Motion for Sanctions on October 24, 2024,  
21 ECF 78, and Defendants filed a Reply on October 31, 2024, ECF 79. On November 7,  
22 2024, the Court held a hearing on the Motions. ECF 80.

23 //

24 //

---

26 <sup>1</sup> Prof. Fink’s declaration mistakenly states that his affirmative expert report was  
27 submitted as Exhibit 3. ECF 73-3 (Fink Decl.) ¶ 3. It is Exhibit 2. See ECF 73-2 (Fox  
28 Decl.) ¶ 6, Ex. 2.

<sup>2</sup> As explained in III.B.1., Plaintiffs’ Motion does not comply with the Court’s  
Bifurcation Order.

1 **II. LEGAL STANDARD**

2 Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate  
3 where the movant has shown that “there is no genuine dispute as to any material fact and  
4 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Entry of  
5 judgment is appropriate “if, under the governing law, there can be but one reasonable  
6 conclusion as to the verdict.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).  
7 “Material facts are those which may affect the outcome of the case.” *Long v. Cnty. of Los*  
8 *Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006); *In re Caneva*, 550 F.3d 755, 760 (9th Cir.  
9 2008); *Anderson*, 477 U.S. at 248. “A dispute as to a material fact is genuine if there is  
10 sufficient evidence for a reasonable jury to return a verdict for the non-moving  
11 party.” *Long*, 442 F.3d at 1185; *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010).

12 The moving party “bears the initial responsibility of informing the district court of  
13 the basis for its motion, and identifying those portions of [the record], which it believes  
14 demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Cartrett*,  
15 477 U.S. 317, 323 (1986). Where the moving party does not bear the burden of proof at  
16 trial, it need only show that “there is an absence of evidence to support the nonmoving  
17 party’s case.” *Id.* at 325. Once the moving party has met this initial burden, Rule 56(c)  
18 requires the nonmoving party to “go beyond the pleadings and by her own affidavits, or by  
19 the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific  
20 facts showing that there is a genuine issue for trial.’” *Id.* at 324; *Norse v. City of Santa*  
21 *Cruz*, 629 F.3d 966, 973 (9th Cir. 2010) (en banc). The court must grant summary  
22 judgment for the moving party if the nonmoving party “fails to make a showing sufficient  
23 to establish the existence of an element essential to that party’s case, and on which that  
24 party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

25 “[I]n ruling on a motion for summary judgment, the nonmoving party’s evidence ‘is  
26 to be believed, and all justifiable inferences are to be drawn in [that party’s] favor.’” *Hunt*  
27 *v. Cromartie*, 526 U.S. 541, 552 (1999) (quoting *Anderson*, 477 U.S. at 255); *Groh v.*  
28 *Ramirez*, 540 U.S. 551, 562 (2004). A plaintiff’s claims do not survive summary judgment,

1 however, where merely a “scintilla of evidence” supports them. *Anderson*, 477 U.S. at  
2 252. Rather, “there must be evidence on which the [fact finder] could reasonably find for  
3 the plaintiff.” *Id.*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
4 (1986) (requiring more than a “metaphysical doubt” to establish a genuine dispute of  
5 material fact).

### 6 **III. DISCUSSION**

#### 7 **A. Summary Judgment**

##### 8 **1. *The Extrinsic Test***

9 To establish copyright infringement, a plaintiff must show (1) its ownership of a  
10 valid copyright and (2) a defendant’s copying of protected aspects of their work. *Skidmore*  
11 *v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020). Copying contains “two separate  
12 components: ‘copying’ and ‘unlawful appropriation.’” *Id.* (quoting *Rentmeester v. Nike,*  
13 *Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018)). “The hallmark of ‘unlawful appropriation is  
14 that the works share *substantial* similarities.” *Id.* (citing *Newton v. Diamond*, 388 F.3d  
15 1189, 1193 (9th Cir. 2004)). To prove unlawful appropriation, a plaintiff must show that  
16 “the similarities between the two works [are] ‘substantial’ and . . . involve protected  
17 elements of the work.” *Rentmeester*, 883 F.3d at 1117.

18 In determining whether the defendant’s work is substantially similar to the plaintiff’s  
19 copyrighted work, courts in this circuit employ a two-part test: (1) the extrinsic test and  
20 (2) the intrinsic test. *Skidmore*, 952 F.3d at 1064. The extrinsic test “compares the  
21 objective similarities of specific expressive elements in the two works,” whereas the  
22 intrinsic test looks “for similarity of expression from the standpoint of the ordinary  
23 reasonable observer, with no expert assistance.” *Id.* (quoting *Jada Toys, Inc. v. Mattel,*  
24 *Inc.*, 518 F.3d 628, 637 (9th Cir. 2008)). While both tests must be satisfied for the works  
25 to be deemed substantially similar, substantial similarity under the extrinsic test can be  
26 decided at summary judgment because the test is “objective and is often resolved as a  
27 matter of law.” *Gray v. Hudson*, 28 F.4th 87, 97 (9th Cir. 2022) (observing that the intrinsic  
28 test, by contrast, is “‘uniquely suited for determination by the trier of fact’ because of its

1 focus on the lay listener” (citation omitted)); *see also Morrill v. Stefani*, 338 F. Supp. 3d  
2 1051, 1058 (C.D. Cal. 2018) (citing *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*,  
3 462 F.3d 1072, 1077 (9th Cir. 2006)). Even though the court must “refrain from usurping  
4 the jury’s traditional role of evaluating witness credibility and weighing the evidence, the  
5 extrinsic test requires [the court] ensure that whatever objective similarities the evidence  
6 establishes between two works are legally sufficient to serve as the basis of a copyright  
7 infringement claim regardless of the jury’s view.” *Gray*, 28 F.4th at 97.

8 “Crucially, because only substantial similarity in protectable expression may  
9 constitute actionable copying that results in infringement liability, ‘it is essential to  
10 distinguish between the protected and unprotected material in a plaintiff’s work.’”  
11 *Skidmore*, 952 F.3d at 1064 (quoting *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004)).  
12 Thus, the extrinsic test requires “a three-step analysis: (1) the plaintiff identifies similarities  
13 between the copyrighted work and the accused work; (2) of those similarities, the court  
14 disregards any that are based on unprotectable material or authorized use; and (3) the court  
15 must determine the scope of protection (‘thick’ or ‘thin’) to which the remainder is entitled  
16 ‘as a whole.’” *Corbello v. Valli*, 974 F.3d 965, 974 (9th Cir. 2020) (citing *Apple Computer,*  
17 *Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994)).

## 18 **2. Expert Testimony**

19 To aid the court in distinguishing between protectable and unprotectable expression,  
20 the extrinsic test “often requires analytical dissection of a work and expert testimony.”  
21 *Morrill*, 338 F. Supp. 3d at 1058 (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477,  
22 481 (9th Cir. 2000)); *accord Apple Computer*, 35 F.3d at 1443; *Bernal v. Paradigm Talent*  
23 *& Literary Agency*, 788 F. Supp. 2d 1043, 1059 (C.D. Cal. 2010). Indeed, in musical  
24 infringement cases, the Ninth Circuit explicitly “require[s] parties to present expert  
25 testimony” because “[i]t is unrealistic to expect district courts to possess even a baseline  
26 fluency in musicology.” *Williams v. Gaye*, 895 F.3d 1106, 1137 (9th Cir. 2018).  
27 Disclosure of expert testimony generally must be accompanied by a written report prepared  
28 and signed by the witness. Fed. R. Civ. P. 26(a)(2)(B). The report must contain, *inter alia*,

1 “a complete statement of all opinions the witness will express and the basis and reasons for  
2 them,” “the facts or data considered by the witness in forming them,” and “any exhibits  
3 that will be used to summarize or support them.” *Id.* 26(a)(2)(B)(i)-(iii).

4 The Supreme Court firmly established the district court’s role as the gatekeeper of  
5 expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).  
6 The Federal Rules of Evidence “assign to the trial judge the task of ensuring that an expert’s  
7 testimony both rests on a reliable foundation and is relevant to the task at hand.” *Daubert*,  
8 509 U.S. at 597. Under Rule 702, a proponent of a witness qualified as an expert must  
9 demonstrate to the court that it is more likely than not that:

- 10
- 11 (a) the expert’s scientific, technical, or other specialized knowledge will help
  - 12 the trier of fact to understand the evidence or to determine a fact in issue;
  - 13 (b) the testimony is based on sufficient facts or data; (c) the testimony is the
  - 14 product of reliable principles and methods; and (d) the expert’s opinion
  - 15 reflects a reliable application of the principles and methods to the facts of the
  - 16 case.

16 Fed. R. Evid. 702.

17 Rule 702 “embodies ‘the twin concerns of reliability . . . and helpfulness.’” *Stilwell*  
18 *v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1192 (9th Cir. 2007) (quoting *United States v.*  
19 *Mitchell*, 365 F.3d 215, 234 (3d Cir. 2004)). “Whether testimony is helpful within the  
20 meaning of Rule 702 is in essence a relevancy inquiry.” *Hemmings v. Tidyman’s Inc.*, 285  
21 F.3d 1174, 1184 (9th Cir. 2002). “Expert opinion testimony is relevant if the knowledge  
22 underlying it has a valid connection to the pertinent inquiry. And it is reliable if the  
23 knowledge underlying it has a reliable basis in the knowledge and experience of the  
24 relevant discipline.” *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (citation  
25 omitted). The test for reliability, however, “is not the correctness of the expert’s  
26 conclusions but the soundness of his methodology.” *Daubert v. Merrell Dow Pharms.,*  
27 *Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995). At base, the court must conduct “a preliminary  
28 assessment of whether the reasoning or methodology underlying the testimony is

1 scientifically valid and of whether that reasoning or methodology properly can be applied  
2 to the facts in issue.” *Daubert*, 509 U.S. at 592-93.

3 a) Ferrara Reports

4 The first of Defendants’ experts, Dr. Lawrence Ferrara, was asked to conduct a  
5 comparative musicological analysis of *Carey* and *Vance*. Ferrara Decl. ¶ 3; ECF 68-6 ¶ 2.  
6 Ferrara submitted a 163-page initial report and rebuttal reports (collectively, the “Ferrara  
7 Reports”). Ferrara Decl. ¶¶ 4-6; ECF 68-6; ECF 68-7; ECF 68-8. Ferrara is a musicologist  
8 and Professor of Music and Director Emeritus of all studies in Music and the Performing  
9 Art at New York University. ECF 68-6 ¶ 1. He holds a B.A. in Music from Montclair  
10 State University, an M.M. in Music from the Manhattan School of Music, and a Ph.D. in  
11 Music from New York University. *Id.* ¶ 1, App. 1 at 42. He has authored or co-authored  
12 published books and peer-reviewed articles regarding music analysis and methodologies  
13 in music research. *Id.* He has been an active music copyright consultant for more than 30  
14 years and given lectures on music copyright at several institutions. *Id.* The Court finds  
15 that Ferrara is qualified as a musicology expert.

16 *Methodology.* Ferrara analyzes (1) whether any similarities or differences are  
17 significant from a musicological perspective and (2) whether any shared similarities exist  
18 in prior art. ECF 68-6 ¶ 2. Ferrara consults audio recordings of *Carey* and *Vance*,  
19 published sheet music of *Carey*, audios and/or published sheet music of prior art, and  
20 Plaintiffs’ FAC. *Id.* ¶ 4. To compare the works, he employs the following methodology:  
21 (a) analysis of *Carey* and *Vance* in their entirety, (b) analysis of each of their component  
22 elements individually and in combination, (c) analysis of prior art, and (d) analysis of  
23 *Carey* and *Vance* in their entirety within the context of the analysis of their component  
24 parts and prior art. *Id.* ¶ 5. Ferrara focuses his analyses on the following elements:  
25 (1) structure, (2) harmony, (3) rhythm, (4) melody and, when present, (5) lyrics. *Id.* ¶ 6.  
26 Ferrara describes certain other elements of a musical composition—key, tempo, meter,  
27 instrumentation, and style or genre—as less relevant to identifying significant similarities.  
28 *Id.* ¶ 2.



1           *Structure.* Ferrara defines “structure” as “the organization of musical units or  
2 sections, often dictated by the development of melody and/or lyrics in songs.” *Id.* ¶¶ 6(a),  
3 7. Ferrara provides a chart mapping the compositional structure of *Carey* and *Vance*. *Id.*  
4 ¶ 8. Based on the chart, the only similarity between the songs is the use of standard  
5 structural sections such as Introduction, Verse, Bridge, and Outro, which he considers  
6 musical building blocks and therefore not significant structural similarities. *Id.* ¶¶ 9, 10.  
7 In contrast, Ferrara identifies several significant differences in structure. *Id.* For example,  
8 *Carey* has a sung Introduction Verse and Introduction Chorus, while *Vance* does not. *Id.*  
9 ¶ 9. Where *Carey* has three Chorus sections, one Bridge section, and no solo section, *Vance*  
10 has no Chorus section, two Bridge sections, and a solo section. *Id.* Moreover, the Outro  
11 in *Carey* is six times longer than the Outro in *Vance*. *Id.*

12           *Harmony.* Ferrara defines “harmony” as consisting of both the sequence of chords,  
13 *i.e.*, a chord progression, and harmonic rhythm, *i.e.*, the rate of change of the chords. *Id.*  
14 ¶ 50. Ferrara observes that *Vance* is recorded in the key of A major with a modulation  
15 (*i.e.*, change of key) to B flat (Bb) major at 2:50, whereas *Carey* is recorded in the key of  
16 G major and does not have any change of key. *Id.* ¶ 52. As part of his standard practice,  
17 Ferrara transposes the two compositions to the same key, C major, for purposes of analysis.  
18 *Id.* He attaches his transcriptions as exhibits. *Id.* Ferrara finds that there are no significant  
19 harmonic similarities between *Carey* and *Vance* because the chord progressions and  
20 harmonic rhythms are “very different” in both works. *Id.* ¶ 53. In a comparative chart,  
21 Ferrara highlights as an example the harmony in the 8-bar Verse 1 of *Vance* and the  
22 harmony in bars 1-8 of the 16-bar Verse 1 in *Carey*. *Id.* ¶¶ 8, 53. Apart from the C chord  
23 in bars 1 and 4, Ferrara found every corresponding chord was different. *Id.* ¶ 54. He also  
24 notes, among other differences, that the harmonic rhythm differs insofar as the C chord in  
25 *Carey* does not change for 4 bars, but the C chord in *Vance* changes after only 1 beat in bar  
26 1 and after only 2 beats in bars 3 and 4. *Id.* Ferrara also compares the harmony in the 8-  
27 bar Bridge 1 of *Vance* and the harmony in bars 1-8 of the 16-bar Bridge of *Carey* and  
28 determines that the chord progression and harmonic rhythm are different. *Id.* ¶¶ 8, 57, 58.

1 Based on this analysis, Ferrara concludes that there are no significant harmonic similarities  
2 between *Carey* and *Vance*, but there are significant harmonic differences in chord  
3 progression and harmonic rhythm. *Id.* ¶ 59.

4 *Rhythm.* Ferrara defines “rhythm” as “the pattern and organization of the time values  
5 of sounds and silences as well as the overall rhythmic flow.” *Id.* ¶¶ 6(c), 60. Ferrara states  
6 that, in general, *Vance* is a “slow ballad,” while *Carey* is an “up-tempo song.” *Id.* ¶ 63.  
7 He finds that *Vance* is in 12/8 meter, whereas *Carey* is in 4/4 meter, also known as  
8 “common time.” *Id.* ¶ 61. He further determines that the tempo in *Vance* is 72 dotted  
9 quarter note beats per minute until approximately 3:22, compared to 150 quarter note beats  
10 per minute in *Carey* from 0:51 onward. *Id.* ¶ 62. In addition, Ferrara states that the drum  
11 rhythms are different between the two works. *Id.* ¶ 63. He concludes that there are  
12 significant rhythmic differences between *Carey* and *Vance*, not significant rhythmic  
13 similarities. *Id.* ¶ 64.

14 *Melody.* Ferrara defines “melody” as “a single line of music that consists primarily  
15 of a succession of pitches and the rhythmic durations of those pitches within a melodic  
16 phrase structure. *Id.* ¶¶ 69(d), 66. Ferrara gives examples of “stark” differences in vocal  
17 melodies, even in the melodic settings of the song title. *Id.* ¶¶ 67, 68. He also provides a  
18 comparative chart reflecting that the order or sequence of the scale degrees and the pitch  
19 sequences in the melody sung to the title lyric are significantly different. *Id.* ¶¶ 69-70.  
20 Ferrara determined that not a single corresponding note in *Carey* and *Vance* is the same in  
21 pitch or rhythmic duration. *Id.* ¶ 71. As for the title lyric in both works, Ferrara finds that  
22 the melodic setting is “significantly different.” *Id.* ¶ 72. He concludes that “there are no  
23 significant melodic similarities, but there are very significant melodic differences” between  
24 the songs. *Id.* ¶¶ 72-73.

25 *Lyrics.* Ferrara observes that *Carey* and *Vance* share the same title, and the song  
26 title occurs as a lyric at the end of a structural section in each composition, as is common  
27 in popular songs. *Id.* ¶ 11. However, Ferrara notes that the title lyric occurs at the end of  
28 different structural sections: the Verse in *Vance* and the Chorus in *Carey*. *Id.* Ferrara also

1 notes that the general expressive idea behind the two compositions—that the narrator  
2 wishes for the object of their affection in lieu of other things for Christmas—is “normally  
3 associated with Christmas.” *Id.* ¶ 12. Moreover, although both songs reference  
4 “commonplace Christmas song clichés,” *id.* ¶ 13, Ferrara finds that these tropes were in  
5 common use prior to the release of *Vance* and used differently in the two works, *id.* ¶¶ 13-  
6 15. In addition, Ferrara observes that other commonplace Christmas elements appear in  
7 one song, but not the other. *Id.* ¶ 16. Other shared lyrics—such as “I don’t need,” “don’t  
8 want,” “just one thing,” and “underneath the Christmas tree”—are also combined with  
9 different words and arranged differently in each song. *Id.* ¶¶ 17-25. In summary, Ferrara  
10 describes the lyrical similarities between the songs as “fragmentary, used with different  
11 lyrical phrases, arranged differently, and . . . in common use” prior to *Vance*. *Id.* ¶ 26.

12 As required by the extrinsic test, Ferrara also reviewed and filtered out prior art. *See*  
13 ECF 68-6 at 15-22, 31-39. Specifically, he reviewed transcriptions of 38 Christmas songs  
14 released prior to *Vance* to identify lyrical similarities between *Vance* and prior art. *Id.* ¶ 27.  
15 Ferrara found at least 19 songs predating *Vance* that incorporated the lyrical idea behind  
16 the title phrase, “All I Want for Christmas Is You.” *Id.* ¶¶ 28-46. Several incorporate the  
17 exact or near identical title phrase. *See, e.g., id.* ¶¶ 28, 31-34, 39-42, 46. Because Ferrara  
18 did not identify sufficiently relevant musical similarities between *Carey* and *Vance*, he  
19 found that a search of prior art regarding any harmonies, rhythms, and melodies was not  
20 warranted.<sup>3</sup> *Id.* ¶ 78.

21 Consistent with his methodology, Ferrara considered *Carey* and *Vance* in their  
22 entirety and identified additional differences in lesser elements of musical composition,  
23 such as instrumentation and key. *Id.* ¶¶ 99-100. Based on his analysis of their component  
24 parts and prior art, Ferrara concluded that “[*Vance*] and [*Carey*] in their entirety are very  
25  
26

---

27 <sup>3</sup> Notably, Ferrara documented significant musical similarities between *Vance* and  
28 “My Heart Belongs Only to You,” recorded by Bobby Vinton and released in 1964. ECF  
68-6 ¶¶ 79-97, 105.

1 different songs and the only element of similarity is the use of a common lyrical idea and  
2 Christmas song clichés that were in common use prior to [*Vance*].” *Id.* ¶¶ 102, 104.

3 Based on the foregoing, Defendants have shown that it is more likely than not that  
4 Ferrara employed reliable principles and methods in a manner consistent with the extrinsic  
5 test, and that the Ferrara Reports reflect a reliable application of those principles and  
6 methods. *See* Fed. R. Evid. 702(c), (d). The Ferrara Reports are therefore admissible.

7 b) Lewis Reports

8 The second of Defendants’ experts, Professor Nathaniel Lewis, was asked to conduct  
9 a comparative analysis of the lyrics in *Carey* and *Vance*. ECF 68-9 at 6. He authored a  
10 64-page initial report and rebuttal reports (collectively, the “Lewis Reports”). ECF 68-4  
11 ¶¶ 4-6; ECF 68-10; ECF 68-11; ECF 68-11. Lewis is a Professor of English at Saint  
12 Michael’s College, where he serves, in relevant part, as the Director of the American  
13 Studies Program and Chair of the English Department. *Id.* at 6, 58. He holds a B.A. in  
14 American Studies from Yale University, an M.A. in English from the University of North  
15 Carolina, and a Ph.D. in English from Harvard University. *Id.* His scholarship centers on  
16 the intersection of popular culture, American regionalism, constructions of place, aesthetic  
17 theory, and the written word. *Id.* at 6. He teaches undergraduate English courses, virtually  
18 all of which include the study of song lyrics. *Id.* at 6-7. The Court finds that Lewis is  
19 qualified as a literary expert.

20 *Methodology.* The initial Lewis Report provides a comparative literary analysis of  
21 the lyrics. Lewis treats the lyrics as literary works and considers the following literary  
22 elements: setting, theme, characters, plot, dialogue, pace, sequence of events, and mood.  
23 ECF 68-9 at 7. He draws on analytical and interpretive methodologies commonly used for  
24 prosody, versification, and poetry. *Id.* Consistent with the requirements of the extrinsic  
25 test, he appropriately filters out conventional, familiar literary devices, and other  
26 commonplace elements or ideas. *Id.* He also identifies differences in the songs’ lyrics,  
27 and, in doing so, presents an objective comparative analysis of the songs’ lyrics. *Id.* Lewis  
28 also presents a side-by-side diagram of the *Carey* and *Vance* lyrics. *Id.* at 8-10.

1           *Basic Idea.* Lewis first considers the underlying ideas of *Carey* and *Vance* because  
2 “words or phrases in both works that flow from or are generic to an underlying idea shared  
3 by both works are less likely, if at all, to be significant.” *Id.* at 11. Lewis finds that the  
4 lyrics of both works share the basic idea that “the presence of a loved one is more important  
5 than the trappings and material gifts of the Christmas season.” *Id.* Based on a review of  
6 prior art, Lewis concludes that this theme was a popular convention of Christmas songs  
7 before the release of *Vance* in 1989. ECF 68-9 at 11-12 (citing eight prior works reflecting  
8 the commonplace idea that love matters more than Christmas presents). Because this  
9 theme was an established convention of Christmas songs, Lewis determines that it is not a  
10 significant similarity between *Carey* and *Vance*. *Id.* at 12.

11           *Words and Phrases.* Turning to the lyrics themselves, Lewis finds that both *Carey*  
12 and *Vance* use conventional words and phrases associated with the Christmas season, but  
13 that the songs generally employ *different* seasonal words. *Id.* at 13. Lewis provides a  
14 helpful diagram reflecting this finding.<sup>4</sup> *Id.* at 13-14. As for the words that appear in both  
15 songs, Lewis identifies only five: mistletoe, Santa Claus/Santa, snow, stocking(s), and  
16 Christmas. *Id.* at 15. Based on the etymology of each word and a comparative analysis of  
17 the lyrics, Lewis determines that these shared words are ubiquitous in Christmas songs and  
18 used differently in *Carey* and *Vance*. *Id.* at 15-21. From a review of prior art, Lewis finds  
19 that the shared Christmas words appear in earlier songs. *Id.* at 21-23 (referencing 14 songs  
20 that use three of the five words). Lewis concludes that the five words common to *Carey*  
21 and *Vance* are generic and not a significant similarity between the two works. *Id.* at 23.

22           As for phrases common to the two works, Lewis identifies two seasonal phrases—  
23 “all I want for Christmas is you” and “underneath the Christmas tree”—as well as the  
24 phrases “just one thing” and “come true” and fragments referring to “wanting” or  
25

---

26           <sup>4</sup> Among the subtle but notable differences highlighted by Lewis is the use of “sleigh  
27 bells” in *Carey* and “sleigh rides” and “silver bells” in *Vance*. ECF 68-9 at 14-15. Lewis  
28 explains that it would be misleading to suggest that both songs refer to “sleighs” and “bells”  
because these words appear in the two songs only as constituent parts of nouns that differ  
significantly in meaning. *Id.* at 15.

1 “needing.” *Id.* Lewis observes, however, that the seasonal phrases are preceded and  
2 followed by different words and expressions. *Id.* at 23-24, 26. Lewis notes 12 works  
3 released prior to 1989 that use the phrase “all I want for Christmas is you” or a slight  
4 variation of that phrase. *Id.* at 24-25. Citing additional authorities, Lewis concludes that  
5 both phrases were established elements of Christmas songs prior to 1989 and therefore not  
6 a significant similarity. *Id.* at 25-26, 26-27. Lewis also observes that expressions of  
7 wanting or needing are phrased differently in the two works and that the remaining shared  
8 phrases are sentence fragments that are commonly used in everyday speech. *Id.* at 27-34.  
9 Based on the above findings, Lewis concludes that there are no significant similarities and  
10 only significant differences between the lyrics of *Carey* and *Vance*. *Id.* at 38.

11 *Additional Lyrical Elements.* Lewis also compares the setting, theme, characters,  
12 plot, sequence of events, dialogue, pace, and mood of the two works. *Id.* at 38-50. He  
13 observes that although the setting for both works is Christmastime, they reflect  
14 significantly different approaches to setting. *Id.* at 39-40 (noting that *Vance* conveys “an  
15 abstract, generalized Christmastime setting” without any depiction of place or time,  
16 whereas *Carey* is “more attentive” to setting and emphasizes the present moment). As for  
17 characters, Lewis notes that although *Carey* and *Vance* are written in the first person and  
18 present two main characters—the speaker (“I”) and the addressee (“you”)—these  
19 characters are commonplace, but also conveyed differently in the two works. *Id.* at 42  
20 (stating that in *Vance*, the speaker and addressee have no defined characteristics, and their  
21 relationship is undefined, whereas in *Carey*, the speaker expresses romantic desire for the  
22 addressee, who is geographically distant). In terms of plot, Lewis states that *Vance*  
23 “presents no plot,” while *Carey* “tell[s] a story.” *Id.* at 44. For similar reasons, Lewis  
24 identifies differences in pace and sequence of events. *Id.* at 46-48. Lastly, as to dialogue  
25 and mood, Lewis finds that the speaker in *Vance* delivers “a series of gentle assertions of  
26 affection and abstract declarations of tenderness” in a formal, reserved tone to convey an  
27 affectionate, sincere, and warm mood. *Id.* at 46, 49. In contrast, Lewis states that the  
28

1 speaker in *Carey* emphasizes yearning in a passionate, informal tone to create a more  
2 emotionally charged and dramatic mood. *Id.*

3 Lewis concludes that *Carey* and *Vance* “are, in terms of their lyrics, decidedly  
4 different songs sharing only generic references to Christmas tropes and commonplace  
5 words and phrases, used differently. There are no significant similarities between [*Vance*]  
6 and [*Carey*], either individually or in the two songs’ lyrics as a whole.” *Id.* at 50.

7 Based on the foregoing, Defendants have demonstrated that it is more likely than not  
8 that Lewis employed reliable principles and methods as required by the extrinsic test, and  
9 that the Lewis Reports reflect a reliable application of these principles and methods. *See*  
10 Fed. R. Evid. 702(c),(d). Accordingly, the Lewis Reports are admissible.

11 c) Fink Report

12 The first of Plaintiffs’ experts, Professor Robert Fink, was asked to “render a  
13 preliminary opinion as to the relationship between [*Carey*] and [*Vance*].” ECF 73-5 at 25.  
14 Fink authored an initial two-page report (the “Fink Report”).<sup>5</sup> ECF 73-3 ¶¶ 3-4, Ex. 2 (ECF  
15 73-5 at 24-27). He did not submit any rebuttal report. The Court finds that Fink is qualified  
16 as a musicology expert. Fink is the Special Academic Senior Associate Dean and Professor  
17 of Musicology/Music Industry at the University of California Los Angeles (“UCLA”) Herb  
18 Alpert School of Music and Director of the Berry Gordy Music Industry Center at UCLA.  
19 ECF 73-3 ¶ 2. He holds a Ph.D. in Music History and Literature from the University of  
20 California, Berkeley and an M.A. in Music Theory from the Eastman School of Music at  
21 the University of Rochester. *Id.* He has taught courses on popular music at UCLA and  
22 authored two books focusing on popular music and minimal music. *Id.* His areas of study  
23 include, in relevant part, analyzing the poetic qualities of song lyrics. *Id.*

---

24  
25  
26 <sup>5</sup> Fink later states in his declaration that he was asked to perform “a comparative  
27 musicological analysis” of the two works. ECF 73-3 ¶¶ 3, 7. This testimony is in tension  
28 “render[s] a preliminary opinion as to the relationship” between the two works and bases  
its conclusions on a “preliminary analysis.” ECF 73-5 at 25, 27.

1 Defendants object to the admissibility of the Fink Report in its entirety on the  
2 grounds that it is irrelevant and not based upon reliable principles and methods in so far as  
3 Fink failed to apply and adhere to the extrinsic test. ECF 76-2 (Obj.) 63. The Court  
4 sustains Defendants’ objection.

5 The Fink Report is deficient on its face. It consists of a scant six paragraphs of  
6 “preliminary” findings covering less than three pages without any supporting exhibits. *See*  
7 ECF 73-5 at 24-27. “Brevity alone does not render an expert report deficient, but [the Fink]  
8 Report is silent on too many matters to be considered either adequately supported or  
9 probative of the [only] issue [at hand]—the application of the extrinsic test.” *Johannsongs-*  
10 *Publ’g Ltd. v. Lovland*, No. CV 18-10009-AB (SSx), 2020 WL 2315805, at \*5 (C.D. Cal.  
11 Apr. 3, 2020). At the outset, Fink does not provide any explanation of the principles or  
12 methods he relied on to form his opinion. He does not disclose what materials he reviewed  
13 in making his findings, apart from a single reference to an unattached, “preliminary  
14 transcription” of *Carey*. ECF 73-5 ¶ 5, at 24. Nor does he provide an adequate description  
15 of the technical terms used in his analysis or their relevance. *E.g., id.* at 25-26 (referring  
16 to “lyrical realizations,” “musical style,” “root progression,” “tonal harmony,” “patterns of  
17 tension and release,” “scale degree,” among other undefined terms). Because of these  
18 omissions, the Court has no way of determining whether the Fink Report is the product of  
19 any reliable principles and methods.

20 Notwithstanding the lack of any stated methodology, it is abundantly clear that Fink  
21 does not apply the principles and methods required of the extrinsic test. That is, he does  
22 not “compare[] the objective similarities of specific expressive elements in the two works.”  
23 *Skidmore*, 952 F.3d at 1064. For starters, his analysis is incomplete and, in Fink’s own  
24 words, “preliminary.” ECF 73-5 at 27 (speculating on what “detailed analysis” may or  
25 may not reveal); *see also* ECF 68-5 (Lamm Decl.) ¶ 4, Ex. 9 (Fink Depo.) at 174:13-15  
26 (“A. This is a preliminary report so I don’t consider this definitive in terms of prior art. Q.  
27 Why did you not prepare a full report? A. I wasn’t asked to do so.”). Indicative of this  
28 lack of comprehensiveness, Fink provides a single diagram comparing the melody and



1 harmony of only the lyrical hook, “All I want for Christmas is You,” without any “melodic-  
2 harmonic” comparison of the remainder of the compositions. ECF 73-5 ¶ 5, fig. 1. With  
3 respect to even this limited comparison, Fink claims a similarity in the hook melodies based  
4 on four corresponding pitches, but critically ignores the *rhythmic organization* of those  
5 pitches. *See id.* It is well-settled and undisputed that a melody “involves more than writing  
6 down a sequence of pitches; at a minimum, that sequence must also be ‘rhythmically  
7 organized’ so as to form an ‘esthetic whole.’” *Gray*, 28 F.4th at 99 (citation omitted); *see*  
8 ECF 73 at 25. Fink later admitted at his deposition that the rhythmic organization is  
9 different. Fink Depo. at 158:4-159:15 (“A. I will say I don’t think there is any way that I  
10 would notate that, if I was going to use notation, where I could make the numbers line up  
11 . . . . the rhythms are different.”).

12 Fink also bases his conclusions on the inverse ratio rule, which required “a lower  
13 standard of proof of substantial similarity when a high degree of access [to the protected  
14 work] is shown.” *Skidmore*, 952 F.3d at 1065-66 (quoting *Three Boys*, 212 F.3d at 486-  
15 87). He states in his report that a claimed similarity would be significant “given . . . *a*  
16 *strong case for access.*” ECF 73-5 ¶ 6, at 26 (emphasis added). *Skidmore* explicitly  
17 abrogated the inverse ratio rule in this circuit, explaining: “Because the inverse ratio rule,  
18 which is not part of the copyright statute, defies logic, and creates uncertainty for the courts  
19 and the parties, we take this opportunity to abrogate the rule in the Ninth Circuit and  
20 overrule our prior cases to the contrary.” *Id.* at 1066. In so holding, the Ninth Circuit  
21 “join[ed] the majority of [its] sister circuits that have considered the inverse ratio rule and  
22 have correctly chosen to excise it from copyright analysis.” *Id.* at 1069. The court clarified  
23 that it is “not suggesting that access cannot serve as circumstantial evidence of actual  
24 copying in all cases; *access, however, in no way can prove substantial similarity.*” *Id.*  
25 (emphasis added).

26 Moreover, the Fink Report lists random, isolated lyrical (and other elemental)  
27 similarities in the two compositions without putting those similarities into the context of  
28 the entire compositions. *E.g.*, ECF 73-5 ¶ 1, at 25 (“Many images and phrases are carried

1 over from [*Vance*] to [*Carey*] including ‘mistletoe’ and ‘Santa,’ ‘sleigh bells’ and ‘snow,’  
2 ‘asking’ for something, the phrase ‘I don’t want’ or ‘I don’t need,’ a ‘dream’ or a ‘wish’  
3 that might ‘come true,’ the exact phrase ‘underneath the Christmas tree,’ and, of course,  
4 the exact title phrase ‘*All I want for Christmas is you.*’”). But “‘lists of similarities’ are  
5 ‘inherently subjective and unreliable,’ especially where,” as here, “they ‘emphasize . . .  
6 random similarities scattered throughout the works.’” *Olson v. Nat’l Broad. Co., Inc.*, 855  
7 F.2d 1446, 1450 (9th Cir. 1988) (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th  
8 Cir. 1984)).

9 Critically, Fink does not distinguish between protected and unprotected material as  
10 required under the extrinsic test. See *Skidmore*, 952 F.3d at 1064 (“[I]t is essential to  
11 distinguish between the protected and unprotected material in a plaintiff’s work.” (citation  
12 omitted)). Fink claims similarities in elements that he admits are commonplace, which  
13 means they are unprotected. For example, he observes that many of the images and phrases  
14 conjured by the lyrics are “conventional Christmas trappings” and “traditional seasonal  
15 images.” ECF 73-5 ¶¶ 1, 2. Instead of ignoring these commonplace tropes as required  
16 under the extrinsic test, Fink explicitly relies on them in concluding that “the piling up of  
17 substantially similar turns of phrase is striking.” *Id.* ¶ 2. It is undisputed that Fink did not  
18 search for prior art before rendering his opinion. ECF 71 (“P-SGD”) 5. Because he did  
19 not consider any prior art, Fink’s comparison of *Carey* and *Vance* “fail[s] to filter out  
20 unprotectable prior art elements, which is the foundation of the extrinsic test.”  
21 *Johannsongs-Publishing Ltd. v. Lovland*, 2020 WL 2315805, *aff’d*, No. 20-55552, 2021  
22 WL 5564626 (9th Cir. Nov. 29, 2021) (holding that the district court did not abuse its  
23 discretion in excluding expert report for “fail[ing] to filter out similarities that are  
24 attributable to prior art, as required under the extrinsic test”). Because Fink did not  
25 compare the works in the manner required, his opinions about the similarities between the  
26 works are “legally deficient and irrelevant” as to the extrinsic test. *Id.*; see also *Yonay v.*  
27 *Paramount Pictures Corp.*, No. CV 22-3846 PA (GJSX), 2024 WL 2107721, at \*3 (C.D.  
28

1 Cal. Apr. 5, 2024) (finding that expert’s failure to filter out unprotected elements  
2 “render[ed] his opinions unhelpful and inadmissible”).

3 Based on the foregoing, the Court finds that the Fink Report is not based on sufficient  
4 facts or data, is not the product of reliable principles and methods, and does not reflect a  
5 reliable application of the principles and methods required by the extrinsic test. *See Fed.*  
6 *R. Evid.* 702. The Court deems the Fink Report inadmissible.

7 d) Sakakeeny Report

8 The second of Plaintiffs’ experts, Dr. Matthew Sakakeeny, was asked to perform “a  
9 comparative musicological analysis” of *Carey* and *Vance*. ECF 73-4 ¶ 2. He authored an  
10 eight-page initial report, dated July 11, 2022 (the “Sakakeeny Report”). *Id.* ¶ 2, Ex. 3 (ECF  
11 73-5 at 28-38). He did not submit any rebuttal report. The Court finds that Sakakeeny is  
12 qualified as a musicology expert. He is an Associate Professor of Music at Tulane  
13 University and holds a Ph.D. in Musicology from Columbia University and an M.A. in  
14 Musicology from Tulane University. ECF 73-4 ¶ 1 (sic). He has authored three books on  
15 the study of music and written several articles and book chapters. *Id.* He teaches courses  
16 on, among other topics, sound studies, Black music and Black lives, and music and politics.  
17 *Id.* His areas of study include analyzing and historicizing American popular music as well  
18 as analyzing the sonic properties of music and poetic qualities of song lyrics in American  
19 popular music. *Id.*

20 Defendants object to the admissibility of the Sakakeeny Report in its entirety on  
21 the grounds that it is (1) irrelevant in this initial phase as to the extrinsic test and (2) not  
22 based on reliable principles and methods, in so far as Sakakeeny failed to apply and adhere  
23 to the extrinsic test. Obj. 96.

24 Unlike the Fink Report, the Sakakeeny Report describes some principles and  
25 methods of analysis. Specifically, it is organized into five sections to compare the  
26 following musical elements in order of importance: (1) lyrics, (2) primary melody or  
27 “hook,” (3) overall melody and phrasing, (4) harmony, and (5) rhythm. ECF 73-5 at 29.  
28 Nevertheless, it suffers from similarly obvious deficiencies that render it inadequately

1 supported. *See Johannsongs*, 2020 WL 2315805, at \*5. As with the Fink Report, several  
2 of the musical elements are left undefined, and their relevance unexplained. *E.g., id.* at 32  
3 (referring to, among other undefined elements, “harmonic background,” “rhythmic  
4 placement and emphasis,” “the overall ‘contour’ or direction of the melody,” and  
5 “harmonic language”). And apart from vaguely referencing prior art and the sheet music,  
6 *see* ECF 73-5 at 29, 35-36, it is unclear what materials Sakakeeny reviewed and relied upon  
7 before rendering his opinion. Thus, while the Sakakeeny Report contains some semblance  
8 of methodology, the Court still strains to ascertain the reliability of the methods and  
9 principles employed.

10 What is clear is that Sakakeeny did not reliably apply the extrinsic test as required.  
11 Again, essential to the extrinsic test is the need to distinguish between protected and  
12 unprotected material. *See Skidmore*, 952 F.3d at 1064. Far from filtering out unprotected  
13 materials, Sakakeeny claims similarities in elements that he freely admits are  
14 commonplace. *E.g.*, ECF 73-5 at 33 (acknowledging that the C-minor chord used in both  
15 works is “referred to as the ‘Christmas chord’ and on its own is not unusual”) and 34  
16 (conceding that “many Christmas songs use comparable rhythms and meters”). It is also  
17 undisputed that Sakakeeny did not analyze any prior art before rendering his opinion. P-  
18 SGD 6; *see also* ECF 68-5 ¶ 8, Ex. 10 (Sakakeeny Depo.) at 116:11-15, 196:19-23.  
19 Sakakeeny makes a passing reference to prior art, acknowledging that “[t]here are works  
20 by the same title that predate [*Vance*],” ECF 73-5 at 1, and concludes without any  
21 explanation that “[*Vance*] does not ‘recycle’ lyrical phrases or storylines of the previous  
22 songs with anywhere near the consistency that [*Carey*] does with [*Vance*],” *id.* But that is  
23 not the kind of analysis that is “legally relevant”—Sakakeeny “does not filter out elements  
24 of these prior art songs from [*Carey*] and [*Vance*] and compare the remainder as the case  
25 law requires.” *Johannsongs-Publ'g Ltd. v. Lovland*, No. CV 18-10009-AB (SSX), 2020  
26 WL 2315805, at \*6 (C.D. Cal. Apr. 3, 2020). “[T]he point is to eliminate the non-  
27 protectible prior art components from the songs in issue, and then compare the protectable  
28 remainder, to see how similar that protectible remainder is. A comparison that includes

1 both unprotectible and protectible elements is invalid under the extrinsic test and is legally  
2 irrelevant.” *Id.*; see also *Yonay*, 2024 WL 2107721, at \*3; *Knowles v. Spin Master, Inc.*,  
3 No. CV 18-5827 PA (JCX), 2019 WL 4565102, at \*4 (C.D. Cal. Sept. 17, 2019).

4 Several conclusions made in the Sakakeeny Report are also based on unreliable  
5 factual assertions. For instance, Sakakeeny concludes that “[t]here are an enormous  
6 number of similarities in the lyrics between the two works. Based on the included chart,  
7 50% of the lyrics in [*Vance*] were copied or modified (“recycled”) in [*Carey*].” ECF 73-6  
8 at 29, 32. But the chart reflects that Sakakeeny included in his estimation of similarities  
9 lyrics that are in fact different. *E.g., id.* at 30 (highlighting “[s]ilver bells” and “sleigh  
10 rides” in *Vance* and “sleigh bells” in *Carey*), 30-31 (highlighting “Santa can’t bring me  
11 what I need” in *Vance* and “Santa, won’t you bring me the one I really need?” in *Carey*).  
12 Sakakeeny even conceded at his deposition that the lyrics chart contains errors and  
13 alterations to the songs’ lyrics. Sakakeeny Depo. at 56:4-17 (“Q. Do you agree that this  
14 singer, in the last three lines, sings the lyrics “‘cause all I want for Christmas is you; ‘cause  
15 all I want for Christmas is you”? A. Yeah. Q. And why was that word “‘cause” omitted  
16 from those lines in your report? A. For two reasons . . . . But *I think if you wanted to*  
17 *accurately transcribe it, you could include the – you would include the “‘cause”* (emphasis  
18 added)), 57:6-19 (“Q. In Bridge 1 and Bridge 2 do you see the lines that you’ve transcribed  
19 as “all that I want can be found”? A. Yes, I do. . . . Q. In Measure 21 you write that lyric  
20 as “it can’t be found”; do you see that? A. Yes, that is the correct transcription. I made  
21 an error in the section you were referring to earlier.”).

22 Sakakeeny also states his opinion on issues that are wholly irrelevant to the extrinsic  
23 test, such as “the likelihood that Carey had access to [*Vance*] prior to the composition of  
24 her work.” ECF 73-5 at 29, 34. Not only was Sakakeeny not designated as an expert on  
25 access, but it is also well-settled that access is irrelevant to determining objective  
26 similarities in protected expression. See *Skidmore*, 952 F.3d at 1069 (“[A]ccess, however,  
27 in no way can prove substantial similarity.”). He also speculates on originality, another  
28 irrelevant element, claiming that “the original words in [*Carey*] are simply additive to what

1 originally appeared in [*Vance*] (e.g. presents, fireplace, toy, reindeer, lights) and thus not  
2 wholly original.” *Id.* at 32. Sakakeeny also assumes copying, “estimat[ing] that 50% of  
3 the lyrics in [*Vance*] were copied or modified (“recycled”) in [*Carey*]” and stating without  
4 analysis that *Vance* “does not ‘recycle lyrical phrases or storylines of the previous songs  
5 with anywhere near the consistency that [*Carey*] does with [*Vance*].” ECF 73-5 at 29. The  
6 inclusion of this irrelevant analysis obfuscates the issues and undermines the reliability of  
7 Sakakeeny’s testimony.

8 Lastly, as with the Fink Report, the Sakakeeny Report claims similarities in isolation  
9 and fails to put those elements “in the context of the entire compositions.” *Johannsongs*,  
10 2020 WL 2315805 at \*5-6 (granting summary judgment against plaintiff where plaintiff’s  
11 expert “tallie[d] up the number of similarities and conclude[d] that there are more  
12 similarities between” the two works than in prior art). As explained above, this  
13 methodology is “inherently subjective and unreliable” because it “emphasize[s] random  
14 similarities scattered throughout the works,” not similarities in protected expression.  
15 *Olson*, 855 F.2d at 1450 (citation omitted).

16 Plaintiffs have not demonstrated that it is more likely than not that the Sakakeeny  
17 Report is the product of reliable principles or methods required of the extrinsic test and  
18 reflects the reliable application of those principles and methods. Because Sakakeeny does  
19 not reliably apply the extrinsic test, his report is legally irrelevant as to the sole issue before  
20 the Court. Accordingly, the Court excludes the Sakakeeny Report.

21 e) Fink and Sakakeeny Declarations

22 Defendants object to Fink’s declarations (the “Fink Declarations”) and Sakakeeny’s  
23 declarations (the “Sakakeeny Declarations”) on the grounds, among others, that (1) the  
24 declarations fail to apply the extrinsic test and therefore are irrelevant and inadmissible and  
25 (2) portions of their declarations and attached exhibits constitute untimely rebuttal and sur-  
26 rebuttal opinions that should be disregarded. Objs. 95, 103, 105-15, 118-19, 124-25. The  
27 Court sustains these objections.

28

1 The Fink Declarations and Sakakeeny Declarations primarily reiterate conclusions  
2 made in the Fink Report and the Sakakeeny Report, respectively. ECF 69-3 ¶¶ 5-6, 8-13;  
3 ECF 73-3 ¶¶ 5-6, 8-13; ECF 69-4 ¶¶ 5-6, 8-15; ECF 73-4 ¶¶ 4-7, 21-23, 28. Having found  
4 that the Sakakeeny Report and Fink Report are inadmissible for reasons explained above,  
5 the Court concludes that these portions of the Fink and Sakakeeny Declarations are  
6 inadmissible.

7 The Fink and Sakakeeny Declarations also purport to respond to Ferrara's and  
8 Lewis' testimony. *E.g.*, ECF 73-3 ¶ 14-18; ECF 73-4 ¶¶ 8-15. Sakakeeny even attaches  
9 to his latest declaration certain "Independent Research" that was not included in his initial  
10 report and produced just prior to and even *during* his deposition, well past the rebuttal  
11 expert disclosure deadline. ECF 73-4 ¶ 8; ECF 76-3 (Lamm Reply Decl.) ¶¶ 4-7 (reflecting  
12 that Defendants' counsel received portions of the "Independent Research" on the eve of  
13 Sakakeeny's deposition and during the deposition, that Sakakeeny revised the  
14 "Independent Research" during the deposition, and that Defendants' counsel objected to  
15 the "Independent Research" at the deposition as an untimely rebuttal report).

16 It is well-settled that "[a] party must submit its expert witness disclosures 'at the  
17 times and in the sequence that the court orders.'" *Luke v. Fam. Care & Urgent Med.*  
18 *Clinics*, 323 Fed. App'x 496, 498 (9th Cir. 2009) (citing Fed. R. Civ. P. 26(a)(2)(C)); *see*  
19 *also Wong v. Regents of Univ. of California*, 410 F.3d 1052, 1058, 1060 (9th Cir. 2005).  
20 A responding party is "entitled to a *complete* disclosure of all opinions" by the court-  
21 ordered deadlines, "not a sneak preview of a moving target." *Mariscal v. Graco, Inc.*, 52  
22 F. Supp. 3d 973, 983-84 (N.D. Cal. 2014) (excluding expert opinion offered for the first  
23 time at summary judgment). "Although Rule 26(e) obliges a party to supplement or correct  
24 its disclosures upon information later acquired, this does not give license to sandbag one's  
25 opponent with claims and issues which should have been included in the expert witness'  
26 report." *Id.* (quoting *Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1062 (C.D. Cal. 2010)).  
27 Under Rule 37(c)(1), untimely expert opinions and supporting materials must be excluded  
28 unless the propounding party can meet their burden of showing that their failure was either

1 “substantially justified” or “harmless.” *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259  
2 F.3d 1101, 1106 (9th Cir. 2001).

3 The Court’s Bifurcation Order required Plaintiffs to submit rebuttal reports by June  
4 3, 2024.<sup>6</sup> See ECF 58. They did not. Now, months past the deadline, Plaintiffs  
5 inexplicably attempt to rehabilitate their witnesses by having them respond in their  
6 declarations to the Ferrara and Lewis Reports. Plaintiffs make no showing that their failure  
7 to timely disclose expert testimony was substantially justified or harmless. Plaintiffs only  
8 lament that “[d]ue to time constraints on the experts, the expert depositions stood in for  
9 any rebuttal report.” P-SGD 4. The Court is not moved by such excuses. Depositions are  
10 not rebuttal disclosures. “A party’s inability to prepare an expert report within the  
11 discovery and expert disclosure deadlines set forth in a scheduling order does not excuse  
12 compliance with the requirements of Rule 26(a)(2)(B).” *Wilderness Dev., LLC v. Hash*,  
13 No. CV 08-54-M-JCL, 2009 WL 564224 (D. Mont. Mar. 5, 2009) (citing *Salgado v. Gen.*  
14 *Motors Corp.*, 150 F.3d 735, 741 (7th Cir. 1998)). Plaintiffs could have, but did not file a  
15 motion to extend the rebuttal deadline, and their failure to do so “amounts to nothing more  
16 than poor case management and lack of care and due diligence.” *Pineda v. City & Cnty.*  
17 *of San Francisco*, 280 F.R.D. 517, 521 (N.D. Cal. 2012). Moreover, that these rebuttals  
18 were inserted into the experts’ later-filed declarations in support of Plaintiffs’ Opposition,  
19 but *not* their earlier-filed declarations in support of Plaintiffs’ own Motion for Summary  
20 Judgment, tells a clear tale of too little, too late. Compare ECF 69-3 and ECF 69-4 with  
21 ECF 73-3 and ECF 73-4.

22 The Court concludes that the Fink Declarations and the Sakakeeny Declarations are  
23 a product of unreliable and unhelpful expert testimony and untimely rebuttal testimony.  
24 Accordingly, the Court excludes the Fink and Sakakeeny Declarations.

---

26  
27  
28 <sup>6</sup> Plaintiffs also argue that rebuttal reports are permissible, not mandatory. See P-  
SGD 4. This ignores the unambiguous language of the Court’s Bifurcation Order, which  
ordered that “the parties *shall* exchange [Rule] 26(a)(2) rebuttal expert disclosures as to the  
extrinsic test.” ECF 53 at 3 (emphasis added). “Shall” means must, not may or should.



1 Based on the foregoing, Plaintiffs have not met their burden of showing that *Carey*  
2 and *Vance* are substantially similar under the extrinsic test.<sup>7</sup> Because Fink and Sakakeeny’s  
3 testimony is not admissible, the well-supported conclusions made in the Ferrara Reports  
4 and the Lewis Reports are effectively un rebutted and not genuinely disputed. A plaintiff  
5 who fails to satisfy the extrinsic test cannot survive summary judgment on a copyright  
6 claim. *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010).  
7 Accordingly, the Court **GRANTS** Defendants’ Motion for Summary Judgment and  
8 **DENIES** Plaintiffs’ Motion for Summary Judgment.

9 **B. Request for Sanctions**

10 Federal Rule of Civil Procedure 11 is “intended to deter baseless filings in district  
11 court and imposes a duty of ‘reasonable inquiry’ so that anything filed with the court is  
12 ‘well grounded in fact, legally tenable, and not interposed for any improper purpose.’”  
13 *Islamic Shura Council of S. Cal. v. F.B.I.*, 757 F.3d 870, 872 (9th Cir. 2014) (quoting  
14 *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990)); *see also* Fed. R. Civ. P.  
15 11(b)(1)-(3). “A district court may impose Rule 11 sanctions if a paper filed with the court  
16 is for an improper purpose, or if it is frivolous.” *G.C. & K.B. Invs., Inc. v. Wilson*, 326  
17 F.3d 1096, 1109 (9th Cir. 2003) (citing Fed. R. Civ. P. 11(b)(1)-(2)). Improper purposes  
18 include to “harass, cause unnecessary delay, or needlessly increase the cost of litigation.”  
19 Fed. R. Civ. P. 11(b)(1). A frivolous filing is one that is “both baseless and made without  
20 a reasonable and competent inquiry” into the law and facts. *Townsend v. Holman*  
21 *Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990). “The standard governing both the  
22 ‘improper purpose’ and ‘frivolous’ inquiries is objective.” *G.C. & K.B.*, 326 F.3d at 1109;

---

23  
24 <sup>7</sup> In their Opposition, Plaintiffs contend that even if certain elements are individually  
25 unprotected, the claimed similarities are still protectable as a selection and arrangement.  
26 ECF 73 at 16-19. Yet despite discussing at length case law relevant to a selection and  
27 arrangement theory, Plaintiffs “fail[] to apply it in any way and therefore ha[ve] failed to  
28 advance a selection and arrangement theory in their *own* Motion for Summary Judgment.  
*See* ECF 69.

1 *see also Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994) (explaining that sanctions  
2 cannot be avoided “by operating under the guise of a pure heart and empty head” (citation  
3 omitted)). “The ‘reasonable man’ against which conduct is tested is a competent attorney  
4 admitted to practice before the district court.” *Id.* (quoting *Zaldivar v. City of Los Angeles*,  
5 780 F.2d 823, 830 (9th Cir. 1986)).

6 Here, Defendants argue that Plaintiffs’ filing of their Motion for Summary Judgment  
7 (hereinafter, the “Motion”) is sanctionable because the Motion is frivolous and brought for  
8 an improper purpose. ECF 74-1 at 13-24. Plaintiffs oppose, contending that their claim is  
9 not frivolous, and their Motion was not presented for an improper purpose. ECF 78 at 7-  
10 12.

### 11 **1. Safe Harbor**

12 Rule 11’s safe harbor provision provides that a motion for sanctions “must not be  
13 filed or be presented to the court if the challenged paper, claim, defense, contention, or  
14 denial is withdrawn or appropriately corrected within 21 days after service.” Fed. R. Civ.  
15 P. 11(c)(2). The safe harbor “is meant to give litigants an opportunity to remedy any  
16 alleged misconduct before sanctions are imposed.” *Truesdell v. S. Cal. Permanente Med.*  
17 *Grp.*, 293 F.3d 1146, 1151-52 (9th Cir. 2002) (citation omitted). “After 21 days, if the  
18 offending party has not withdrawn the filing, the movant may file the Rule 11 motion with  
19 the court.” *Id.*

20 Defendants “strictly complied” with the safe harbor provision, as mandated by the  
21 Ninth Circuit. *Islamic Shura Council*, 757 F.3d at 872. On September 23, 2024,  
22 Defendants served a copy of its then-contemplated Motion for Sanctions on Plaintiffs,  
23 along with a cover letter advising Plaintiffs that they had 21 days (until October 14, 2024)  
24 to remedy the alleged violations under the safe harbor. ECF 74-2 (Anderson Decl.) ¶ 3,  
25 Ex. 1. On October 7, 2024, prior to the filing of the Motion for Sanctions, the parties’  
26 counsel held a Local Rule 7-3 conference, at which Plaintiffs’ counsel indicated that it  
27 would withdraw certain arguments subject to the Motion for Sanctions, namely as to  
28 ownership and access. *See* ECF 79 at 7-8. Yet Plaintiffs only withdrew these arguments

1 in their Reply on October 15, 2024, after the safe harbor period had lapsed and Defendants  
2 had filed the Motion for Sanctions earlier the same day. *See* ECF 77 at 2. With arguments  
3 on access and copying withdrawn, Plaintiffs’ Motion for Summary Judgment devotes a  
4 scant three pages to the extrinsic test. ECF 69 at 15-18. Even so, the Court finds that the  
5 remainder is also frivolous for reasons discussed below.

6 **2. Sanctionable Conduct**

7 “An order imposing a sanction must describe the sanctioned conduct and explain the  
8 basis for the sanction.” Fed. R. Civ. P. 11(c)(6). The Court finds that the conduct described  
9 herein is sanctionable pursuant to Rule 11(b)(1) through (3).

10 a) Non-Compliance with the Bifurcation Order

11 The parties agreed that bifurcation would be “the most judicially efficient way to  
12 manage this litigation” because “[i]t would provide the parties an early opportunity to  
13 determine a dispositive issue[.]” ECF 53 at 2. Consistent with this shared understanding,  
14 the Court ordered the parties to conduct discovery and file motions for summary judgment  
15 *as to the extrinsic test only*. *Id.* at 3. The Court stayed all other discovery. *Id.*

16 Despite the parties’ agreement and the Court’s clear instructions, Plaintiffs, by and  
17 through their counsel, inexplicably moved for summary judgment on other elements of  
18 their copyright claim, *i.e.*, ownership, copying, and access. *See* ECF 69 at 10-15.  
19 Plaintiffs’ counsel offers **no** explanation for failing to comply with the Bifurcation Order.  
20 Counsel claims that any reference to issues outside of the extrinsic test was “intended only  
21 as background.” ECF 78 at 6. This explanation strains credulity. Plaintiffs’ Motion  
22 devotes an entire section of the *argument*—not background—to the issues of ownership,  
23 copying, and access. *See* ECF 69 at 10-15. Tellingly, Plaintiffs’ proposed order granting  
24 their Motion requests a finding that “[t]here are no genuine issues of material fact *as to*  
25 *Plaintiffs’ First and Second Causes of Action in the Complaint*,” ECF 69-5 at 2 (emphasis  
26 added), not just as to substantial similarity under the extrinsic test. This requested relief  
27 defies logic considering the parties have not had an opportunity to conduct fact discovery  
28 as to those elements. Plaintiffs’ failure to comply with the Bifurcation Order is clear

1 evidence of Plaintiffs’ improper purpose in filing for summary judgment. Plaintiffs’  
2 counsel, as an officer of the Court, is at fault for this non-compliance. Instead of timely  
3 remedying this misconduct, Plaintiffs’ counsel delayed and needlessly caused Defendants  
4 to oppose irrelevant factual and legal issues that are not properly before the Court.

5 b) Frivolous Contentions of Law

6 Defendants argue that Plaintiffs’ legal arguments are frivolous because they are  
7 based on overruled points of law and are otherwise not colorable. ECF 74-1 at 14-15.  
8 Plaintiffs do not meaningfully respond to Defendants’ arguments, but nevertheless insist  
9 that the Motion contains “legitimate arguments.” ECF 78 at 9.

10 Rule 11 imposes a non-delegable, “affirmative duty” upon the attorney to conduct a  
11 reasonable inquiry into the law before filing a motion. *Lloyd v. Schlag*, 884 F.2d 409, 412  
12 (9th Cir. 1989). Plaintiffs’ counsel did not uphold this duty. As an initial matter, Plaintiffs  
13 submitted legal arguments on elements wholly irrelevant to the extrinsic test. *See* ECF 69;  
14 *cf.* ECF 53. Although Plaintiffs later withdrew these arguments, ECF 77, Plaintiffs’ Motion  
15 is nevertheless frivolous within the meaning of Rule 11 as to the extrinsic test. The Court  
16 agrees with Defendants that Plaintiffs’ Motion is predicated on an abrogated legal rule: that  
17 “substantial similarity is inextricably linked to the issue of access.” ECF 69 at 11 (citing  
18 *Skidmore*, 952 F.3d at 1065-66). As explained above, the very case cited by Plaintiffs  
19 expressly *abrogated* this rule. *Skidmore*, 952 F.3d at 1069 (“Because the inverse ratio rule,  
20 which is not part of the copyright statute, defies logic, and creates uncertainty for the courts  
21 and the parties, we take this opportunity to abrogate the rule in the Ninth Circuit and  
22 overrule our prior cases to the contrary.”). A reasonably diligent review of *Skidmore* would  
23 have made clear that access “in no way can prove substantial similarity” in this circuit. *Id.*  
24 Plaintiffs’ reliance on *Skidmore* for a legal proposition *abrogated by that case* is as clear  
25 an indication as any that Plaintiffs’ counsel did not conduct a reasonable inquiry into the  
26 law prior to filing the Motion.

27 Plaintiffs make no attempt to square their misstatement of the law. In fact, they  
28 double down on outdated legal standards and overruled authorities in their Reply. They

1 once more assert, without any legal support, that “[t]he question of ‘access’ is encompassed  
2 under the ‘copying’ element, along with substantial similarity[.]” ECF 77 at 2. That is not  
3 so. *See Skidmore*, 952 F.3d at 1064 (explaining that copying and unlawful appropriation,  
4 which includes substantial similarity, are “separate components”). Plaintiffs further claim  
5 that “[u]nder *Krofft*, if the extrinsic test reveals similarities in ideas, the court proceeds to  
6 the . . . intrinsic test.” ECF 77 at 2 (citing *Sid & Marty Krofft Tel. Prods., Inc. v.*  
7 *McDonald’s Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977)). This has not been the law of  
8 this circuit for over 30 years. It is true that in *Krofft*, the Ninth Circuit initially conceived  
9 of the extrinsic test as a “test for similarity of ideas” and the intrinsic test as a test of  
10 similarity “in the expression of the ideas.” 562 F.2d at 1164. But the Ninth Circuit has  
11 long since rejected this formulation, holding instead that “the line [between the extrinsic  
12 and intrinsic tests] is more properly drawn between objective and subjective analyses of  
13 expression,” not ideas. *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1473-74  
14 (9th Cir. 1992) (citing *Shaw v. Lindheim*, 919 F.2d 1353, 1357 (9th Cir. 1990)). That is  
15 because “[i]n no case does copyright protection . . . extend to any idea.” 17 U.S.C.  
16 § 102(b); *see also Skidmore*, 952 F.3d at 1069 (“[C]opyright *does* require at least a  
17 modicum of creativity and does not protect . . . ideas, concepts, and common elements[.]”).  
18 Plaintiffs’ continued reliance on abrogated legal principles confirms that Plaintiffs’ counsel  
19 failed to conduct a reasonable inquiry into the law.

20 c) Unsupported Statements of Fact

21 Defendants argue that Plaintiffs’ Statement of Uncontroverted Facts (“SUF”) are  
22 improper because they violate the Local Rules and “simply copy-and-paste[.]” conclusory  
23 allegations from the FAC. ECF 74-1 at 17-18. They further contend that Plaintiffs’ factual  
24 contentions lack any evidentiary basis. *Id.* at 18-22. Plaintiffs accuse Defendants of  
25 “hammering on Plaintiffs’ inclusion of facts unrelated to the extrinsic test” and “misstating  
26 the background information which Plaintiffs did not include for any nefarious purpose[.]”  
27 ECF 78 at 10-12.

1 The Court agrees with Defendants that the Plaintiffs’ SUF violates the Local Rules  
2 and is procedurally improper. The Local Rules require parties moving for summary  
3 judgment to “set forth the material facts as to which the moving party contends there is no  
4 genuine dispute” with each fact “supported by pinpoint citations (including page and line  
5 numbers, if available) to evidence in the record.” L.R. 56-1. Several of the purported facts  
6 set forth in Plaintiffs’ SUF are supported only by Plaintiffs’ FAC or statements made in  
7 conclusory declarations accompanying the Motion, *not* evidence in the record. *See, e.g.*,  
8 ECF 69-1 (P-SUF) 1-14, 24-25, 27-34, 36-43, 66-69. Plaintiffs also fail to pin cite *any* of  
9 the evidence supporting their purported facts. *See generally* P-SUF 16-69.

10 Plaintiffs explain that they included background facts from their pleading “for the  
11 simple purpose of providing a historical context of the two works . . . . There is no reason  
12 to sanction a party for including more, rather than less, factual information.” ECF 78 at  
13 11. As explained above, most facts derived from the FAC are cited in support of irrelevant  
14 arguments on copying, not as background. *See* ECF 69 at 11-13 (citing P-SUF 24-25, 27-  
15 34, 36-43). Further, irrelevant and unsupported allegations in a pleading are *not material*  
16 *facts* at summary judgment and therefore do not belong in a statement of uncontroverted  
17 *facts*. The Court finds that these deficiencies alone are sanctionable under the Local Rules.  
18 *See* L.R. 83-7(a)-(b).

19 Were that all, the Court would hesitate to find such conduct sanctionable under Rule  
20 11. But as Defendants note, many of the other claimed facts are also “vague, compound,  
21 and incomprehensible mixtures of factual assertions and conclusions, subjective opinions,  
22 and other irrelevant evidence.” ECF 74-1 at 17 (citing P-SUF 2, 5, 6, 8-14, 24-25, 27-34,  
23 36-43, 47-64, 66-69). For example, Plaintiffs’ Fact 10 states, without any evidentiary  
24 support, that “Defendants undoubtedly had access to [*Vance*] prior to writing and releasing  
25 [*Carey*] given its wide commercial and cultural success,” P-SUF 10, even though access  
26 was not at issue in this initial phase as to the extrinsic test. Similarly, Fact 68 cites  
27 Sakakeeny’s declaration for the bald proposition that “Carey would have had ample access  
28 to [*Vance*],” P-SUF 68, despite Sakakeeny’s admission that he was never designated as an

1 expert on the factual issue of copying, ECF 69-4 ¶ 7. Although Plaintiffs withdrew certain  
2 legally irrelevant arguments in their Reply, Plaintiffs did not withdraw numerous irrelevant  
3 facts in their Response to Statements of Genuine Dispute (“RSGD”). *See generally* ECF  
4 77-1. At Fact 68, for instance, Plaintiff responds, “As to the disputed portion, Plaintiff  
5 (sic) respectfully refers to Sakakeeny Decl.” *Id.* 68. The RSGD is replete with this type  
6 of perfunctory response. *E.g., id.* 7-9, 12, 19, 23-29, 32-43, 50-68. The Local Rules clearly  
7 provide that for facts disputed by the opposing party, the moving party’s response must  
8 include “pinpoint citations including page and line numbers, if available, to evidence in the  
9 record . . . to rebut the existence of a genuine dispute.” L.R. 56-3.

10 It is clear to the Court that Plaintiffs’ counsel made no reasonable effort to ensure  
11 that the factual contentions asserted have evidentiary support. Thus, the litany of irrelevant  
12 and unsupported factual assertions reflected in Plaintiffs’ SUF and RSGD has served only  
13 to confuse the Court and the parties.

14 \*\*\*

15 Based on the foregoing, the Court finds that Plaintiffs, by and through their counsel,  
16 presented their Motion for an improper purpose, specifically to cause unnecessary delay  
17 and needlessly increase the costs of litigation, and that their Motion is “both baseless and  
18 made without a reasonable and competent inquiry” into the law and facts. *Townsend*, 929  
19 F.2d at 1362. Plaintiffs’ counsel is at fault for the offending conduct. Indeed, in filing a  
20 motion for summary judgment, a reasonable attorney would not have blatantly disregarded  
21 the Court’s Bifurcation Order, raised frivolous legal arguments, and cited irrelevant and  
22 unsupported statements of fact. *See G.C. & K.B.*, 326 F.3d at 1109.

### 23 3. *Nature of Sanctions*

24 If the Court “determines that Rule 11(b) has been violated, the court may impose an  
25 appropriate sanction on any attorney, law firm, or party that violated the rule or is  
26 responsible for the violation.” Fed. R. Civ. P. 11(c)(1). Sanctions can include  
27 “nonmonetary directives,” a penalty payable to the court, and “payment to the movant of  
28 part or all of the reasonable attorney’s fees and other expenses directly resulting from the

1 violation.” Fed. R. Civ. P. 11(c)(1). “[T]he central purpose of Rule 11 is to deter baseless  
2 filings.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). Thus, any Rule 11  
3 sanction “must be limited to what suffices to deter repetition of the conduct or comparable  
4 conduct by others similarly situated.” *Id.* 11(c)(4); *see also In re Yagman*, 796 F.2d 1165,  
5 1184 (9th Cir. 1986) (“It is critical . . . that the sanctioning court embrace the overriding  
6 purpose of deterrence and mold its sanctions in each case so as to best implement that  
7 policy.”). Sanctions should also be imposed “only in the most egregious situations, lest  
8 lawyers be deterred from vigorous representation of their clients.” *United Nat’l Ins. Co. v.*  
9 *R&D Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir. 2001).

10 If requested by motion and warranted for effective deterrence, Rule 11 authorizes  
11 the Court to issue “an order directing payment to the movant of part or all of the reasonable  
12 attorney’s fees and other expenses directly resulting from the violation.” Fed. R. Civ. P.  
13 11(c)(4). However, “Rule 11 provides for sanctions, not fee shifting. It is aimed at  
14 deterring, and, if necessary punishing improper conduct rather than merely compensating  
15 the prevailing party.” *United States ex rel. Leno v. Summit Const. Co.*, 892 F.2d 788, 790  
16 n.4 (9th Cir. 1989); *see also Truesdell v. S. Cal. Permanente Med. Grp.*, 209 F.R.D. 169,  
17 175 (C.D. Cal. 2002).

18 Defendants request that the Court impose sanctions in the amount of reasonable  
19 attorney’s fees that Defendants incurred in preparing their Opposition to Plaintiffs’ Motion  
20 and their Motion for Sanctions. ECF 74-1 at 24. Although each incident of sanctionable  
21 conduct, in isolation, may not warrant more than a stern reprimand, it is the aggregate of  
22 misconduct reflected in Plaintiffs’ Motion that makes this an egregious situation warranting  
23 more severe sanctions. Defendants have demonstrated that the requested fees are “a direct  
24 result of the offending conduct.” *Truesdell*, 209 F.R.D. at 175. Plaintiffs’ Motion  
25 prompted Defendants to incur needless expenses responding to frivolous legal arguments  
26 and unsupported factual contentions. The Court finds that the punitive and deterrent ends  
27 of Rule 11 are best served by imposing sanctions in the amount of some or all attorneys’  
28 fees incurred by Defendants in preparing their Opposition to Plaintiffs’ Motion.



1 Accordingly, the Court **GRANTS** Defendants’ Motion for Sanctions and **ORDERS**  
2 Defendants to file within **14 days** of this Order a motion to determine the amount of  
3 reasonable attorneys’ fees to be awarded.

4 **IV. CONCLUSION**

5 For the foregoing reasons, Defendants’ Motion for Summary Judgment and Motion  
6 for Sanctions is **GRANTED**. Plaintiffs’ Motion for Summary Judgment is **DENIED**. The  
7 Court further **ORDERS** Defendants to file within **14 days** of the date of this Order a  
8 proposed judgment and a motion for attorneys’ fees reasonably incurred in preparing their  
9 Opposition to Plaintiffs’ Motion and the Motion for Sanctions.

10  
11 **IT IS SO ORDERED.**

12  
13 Dated: March 19, 2025



14 HON. MÓNICA RAMÍREZ ALMADANI  
15 UNITED STATES DISTRICT JUDGE  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28