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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

JOHN TOWNES VAN ZANDT II, WILLIAM)
VINCENT VAN ZANDT, KATIE BELLE)
VAN ZANDT, By Her Next Friend, JEANENE)
VAN ZANDT, and JEANENE VAN ZANDT,)

Plaintiffs,)

v.)

KEVIN EGGERS, THE EGGE COMPANY)
LIMITED, THE TOMATO MUSIC WORKS)
LIMITED, TOMATO MUSIC COMPANY,)
LTD., NAVARRE CORPORATION, THE)
ORCHARD ENTERPRISES, INC., and MARY)
EGGERS,)

Defendants.)

Case No. 05 CV 10661 (RJH)

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT AS TO DEFENDANT EGGERS' COUNTERCLAIMS
AGAINST PLAINTIFFS AND FOR PARTIAL SUMMARY JUDGMENT AGAINST
DEFENDANT EGGERS**

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Plaintiffs John Townes Van Zandt II, William Vincent Van Zandt, Katie Belle Van Zandt (collectively the “Van Zandt Children”) and Jeanene Van Zandt (collectively “Plaintiffs”) respectfully submit this memorandum in support of their Motion For Summary Judgment As To Defendant Eggers’ Counterclaims Against Plaintiffs And For Partial Summary Judgment Against Defendant Eggers.

PRELIMINARY STATEMENT

Defendant Kevin Eggers (“Eggers”) is a serial copyright infringer. Since the year 2000, Eggers – through companies controlled by him - has released 14 separate CDs made from master sound recordings (the “Masters”) containing compositions by and performances of deceased singer-songwriter Townes Van Zandt (“Van Zandt”). Mr. Eggers has been on notice since as early as January 23, 2003 of his willful infringement but has simply ignored his obligations to the Plaintiffs.

Meanwhile, more than nine months after Plaintiffs commenced this action, Eggers filed counterclaims against Plaintiffs, alleging that he is the co-owner of copyright in 46 songs (the “Claimed Songs”) composed by Van Zandt. However, the claim is completely devoid of merit. First, the undisputed documentary evidence demonstrates that while, at one point, Eggers co-owned 36 of the Claimed Songs, he sold his interest therein in 1996. As for the remaining 10 songs, Eggers cannot meet his burden of proof to demonstrate he ever had an ownership claim in them. Even if he could, his claim is barred by the Copyright Act’s three-year statute of limitations on copyright claims.

FACTS

The following facts are undisputed.

Plaintiffs’ Copyright Ownership

Together, Plaintiffs are the owners of the worldwide copyrights in Van Zandt’s compositions (the “Compositions”). (Declaration of Jeanene Van Zandt ¶ 2; Exhs. 1-3 (hereinafter referred to as “Van Zandt Decl. ¶ __; Exh. __”).)

Townes Van Zandt was one of the world’s most gifted songwriters who inspired numerous artists and who arguably wrote some of the most beautiful and haunting melodies and

poetry ever recorded. His songs have been recorded by a number of well-known artists, including Willie Nelson, Lyle Lovett, Steve Earle, and Norah Jones. (*Id.* ¶ 6.)

During his career, Van Zandt (either individually or through his production company) entered into a series of recording agreements with companies either owned or controlled by Eggers. Specifically, Van Zandt entered into the following agreements: (i) Agreement with Poppy Records, Inc. dated February 1, 1968 (“Agreement 1”); (ii) Agreement with Poppy Industries, Inc. dated August 5, 1971 (“Agreement 2”); (iii) Agreement with TMC dated September 26, 1977 (“Agreement 3”); (iv) Agreement with TMC June 19, 1978 (“Agreement 4”); and (v) Agreement with The Music Works Limited dated July 26, 1989 (“Agreement 5”) (collectively the “Recording Agreements.”) (*Id.* ¶ 7.)

Eggers’ Copyright Infringement

In or around 2000, Eggers served as Chief Executive Officer of former Defendant Tomato Music Works, Ltd. (“TMW”). (Perkins Exh. 2, ¶ 35.) Under a record label known as “Tomato Records,” Eggers and TMW, among others, created, manufactured, reproduced, distributed and sold Van Zandt Sound Recordings (made from the Masters) (the “Infringing Phonorecords”) domestically for which they either have failed to obtain the requisite mechanical licenses or have failed to pay mechanical royalties. (Perkins Exh. 5.) Indeed, in a Consent Judgment So Ordered on February 6, 2007, TMW conceded that it had released the Infringing Phonorecords without obtaining the requisite mechanical licenses and/or without paying any mechanical royalties. (*Id.*)

The Infringing Phonorecords include, but are not limited to the following albums:

ALBUM	RELEASE DATE
<i>Best of Townes Van Zandt</i>	November 1, 2000
<i>Texas Rain</i>	November 1, 2000
<i>Townes Van Zandt</i>	March 1, 2002
<i>Townes Van Zandt – Flyin’ Shoes</i>	March 1, 2002
<i>Townes Van Zandt – For the Sake of the Song</i>	March 1, 2002

ALBUM	RELEASE DATE
<i>High Low & In Between</i>	March 1, 2002
<i>Late Great Townes Van Zandt</i>	March 1, 2002
<i>Nashville Sessions</i>	March 1, 2002
<i>Our Mother the Mountain</i>	March 1, 2002
<i>Live at the Old Quarter</i>	July 1, 2002
<i>Acoustic Blue</i>	June 1, 2003
<i>Townes Van Zandt – Delta Momma Blues</i>	August 1, 2003
<i>Townes Van Zandt – Be Here to Love Me</i>	August 23, 2005
<i>Live at Union Chapel</i>	October 25, 2005

(Van Zandt Decl. ¶ 12, Exh. 4.)

On January 24, 2003, Kyle Staggs (“Staggs”) from Bug Music, Inc. (“Bug”), the administrator of the Van Zandt song catalog, sent a letter to Eggers’ label, Tomato Records, putting Eggers and TMW on notice that they had failed to obtain any mechanical licenses for any of the Compositions contained on twelve of the Infringing Phonorecords and giving Eggers and TMW thirty days to cure the infringements. (Van Zandt ¶ 13; Exh. 5.)

Eggers engaged in discussions with Staggs on behalf of Tomato Records. In those discussions, Eggers acknowledged that he had failed to obtain mechanical licenses for the Infringing Phonorecords, but claimed that he was entitled to a reduced rate for three of them (an assertion that was incorrect). In an e-mail to Staggs dated February 12, 2003, Eggers wrote “[w]e shall sign and return all new mechanical licenses that have been submitted to us by the Fox office which we presume have been approved by your office with the exception of the three albums noted above.” (Van Zandt Exh. 6.) Notwithstanding Eggers’ representation, virtually no mechanical licenses were entered into and no mechanical royalties paid for any of the Infringing Phonorecords, even for those that Eggers did not dispute were governed by the higher royalty rate. (Van Zandt Decl. ¶ 14; Perkins Exh. 5.)

For nearly two years thereafter, Eggers, through his lawyers, feigned negotiating a settlement of the failure to obtain mechanical licenses and to pay mechanical royalties and for months promised to provide Plaintiffs with an accounting of sales. However, virtually no mechanical licenses were ever entered into and no mechanical royalties were ever paid. Meanwhile, Eggers continued to release Infringing Phonorecords, all in violation of Plaintiffs' rights. (Van Zandt Decl. ¶ 15; Perkins Exh. 5.)

This Lawsuit And Settlement With Some Defendants

As a result of Defendants' continued infringing behavior, including but not limited to, their ongoing sale of the Infringing Phonorecords without paying any royalties, on December 20, 2005, Plaintiffs commenced this action, asserting, *inter alia*, claims for copyright infringement, seeking, *inter alia*, an order enjoining Defendants from further exploiting the Infringing Phonorecords. On July 14, 2006, Plaintiffs served their Second Amended Complaint ("SAC").

On January 23, 2007, Defendants TMW, The Tomato Music Company, Limited ("TMC") (another Eggers entity), and Mary Eggers, entered into a Consent Judgment, which was So Ordered by the Court on February 6, 2007. (Perkins Exh. 5.) In that Consent Judgment, TMW, TMC, and Ms. Eggers admitted that, beginning in 2000, they had created the Infringing Phonorecords "without authorization," that they failed to obtain copyright licenses for most of the Infringing Phonorecords, and failed to pay any mechanical royalties. (*Id.*) Under the Consent Judgment, TMW, TMC, and Mary Eggers also agreed to be enjoined from the manufacture, sale, promotion, and distribution of any products containing any Van Zandt Compositions. (*Id.*)

Thereafter Plaintiffs entered into a settlement with Defendant Navarre Corporation ("Navarre") and on April 19, 2007, the Court So Ordered a Stipulation of Dismissal of Claims against Navarre. (Perkins Exh. 6.) Similarly, Plaintiffs entered into a settlement with Defendant The Orchard Enterprises, Inc. ("Orchard") and on June 29, 2007, the Court So Ordered as Stipulation of Dismissal of Claims against Orchard. (Perkins Exh. 7.)

Eggers' Counterclaim Against Plaintiffs

On September 12, 2006, Eggers filed what he labeled "Counter Claims" against Plaintiffs (the "Eggers Counterclaim"). (Perkins Exh. 3.) Although difficult to understand, it appears from

the Eggers Counterclaim, as well as from Eggers' responses to interrogatories (the "Eggers Interrogatory Response," which is attached as Perkins Exh. 10), that Eggers alleges that he is the co-owner of certain Van Zandt Compositions that should have been included in a corporation called Columbine Music, Inc. (Perkins Exhs. 3, 10.)

In or around May 1978, Eggers and Townes Van Zandt formed a corporation called Columbine Music, Inc. ("Columbine"), in which Eggers and Van Zandt were equal shareholders. (Van Zandt Decl. ¶ 19; Exh. 11.) On June 19, 1978, Van Zandt entered into a publishing agreement (the "Publishing Agreement") with Columbine, under which Van Zandt agreed that any songs created during the term of that agreement would be the property of Columbine. (Van Zandt Exh. 9.) In exchange, Van Zandt was to receive royalties for specified uses. (*Id.*) The Publishing Agreement had a term of five years – from June 19, 1978 through June 19, 1983. (*Id.*) Thus, only songs written between those dates were to be owned by Columbine.

On May 2, 1994, Plaintiff Jeanene Van Zandt and Townes Van Zandt executed a Final Decree of Divorce (the "Divorce Decree"). (Van Zandt Exh. 1.) Under the Divorce Decree, Plaintiff Jeanene Van Zandt was awarded copyright in certain Van Zandt Compositions, including Van Zandt's entire one-half interest in the 50 songs owned by Columbine. (*Id.*)

In late 1996, Eggers decided to sell his interest in Columbine. In connection with that process, Columbine was dissolved and the copyright interests in the songs owned by Columbine were distributed in equal shares to Eggers and Plaintiff Jeanene Van Zandt. (Van Zandt Exh. 11.) On October 11, 1996, Eggers, Van Zandt, and Plaintiff Jeanene Van Zandt executed a document entitled "Confirmation of Ownership Interests" (the "Confirmation") in which they confirmed that Eggers and Plaintiff Jeanene Van Zandt each owned a one-half interest in the songs previously owned by Columbine. (*Id.*) The Confirmation lists all of the songs that Columbine owned (the "Columbine Songs"), which songs are the same ones identified in the Divorce Decree. (Compare Van Zandt Exh. 1 with 11.) Shortly thereafter, Eggers assigned his interest in the Columbine Songs to Bienstock Publishing. (Perkins Exh. 4.)

In explaining the basis of the Eggers Counterclaim in response to Interrogatories posed by Plaintiffs, Eggers claims that Plaintiffs "illegally concealed" songs that were written during the term of the Publishing Agreement, but were not included among the Columbine Songs.

(Perkins Exh. 10.) Eggers identifies the following 46 Claimed Songs that he alleges were kept out of Columbine and which he claims to co-own now:

At My Window	Spider ¹	Highway Kind
Snowin' on Raton	When She Don't Need Me	Mr. Mudd & Mr. Gold
Blue Wind Blue	Pueblo Waltz	No Deal
Ain't Leavin' Your Love	Upon My Soul	Standin'
Buckskin Stallion Blues	Blaze's Blues	To Live Is To Fly
Little Sundance #2	Goin' Down To Memphis	Two Hands
Still Looking For You	Dollar Bill Blues	When He Offers His Hand
Gone Gone Blues	Gone Too Long	You Are Not Needed Now
Catfish Song	A Song For	German Mustard
Rex's Blues	Brother Flower	If I Needed You
No Place To Fall	Flyin' Shoes	No Lonesome Tune
White Freightliner Blues	Blue Ridge Mountains	Pancho & Lefty
Snake Song	Greensboro Woman	Silver Ships Of Andilar
Loretta	Heavenly House Boat Blues	Lover's Lullaby
Two Girls	High, Low & In Between	Marie
		The Hole

(Perkins Exh. 10.) However, all but the following 10 songs *were* in fact included among the songs owned by Columbine, which Eggers sold in late 1996: A Song For, Ain't Leavin' Your Love, Blaze's Blues, Goin Down To Memphis, Gone Gone Blues, Gone Too Long, Lover's Lullaby, Marie, Still Looking For You, and The Hole (collectively the "Claimed Non-Columbine Songs"). (Compare Perkins Exh.5 with Van Zandt Exhs. 1, 11.)

As for the Claimed Non-Columbine Songs, all available evidence establishes that they were written outside of the term of the Publishing Agreement and that, in any event, they were included on publicly released recordings that Eggers knew or should have know were on the market in the 1990s. The chart below shows each of the Claimed Non-Columbine Songs, their date of creation as set forth on copyright registrations (to the extent in Plaintiffs' possession), and the various albums (and their date of release) upon which such songs appeared.

SONG	CREATION DATE	ALBUM	RELEASE DATE
A Song For	1994	No Deeper Blue Live at McCabe's Abnormal	1994 1996 1998

¹ The correct name of this song is "Dream Spider." Van Zandt Exhs. 1, 11.

SONG	CREATION DATE	ALBUM	RELEASE DATE
Ain't Leavin' Your Love	Unknown	At My Window A Far Cry From Dead	1987 1999
Blaze's Blues	1990	No Deeper Blue The Highway Kind Abnormal	1994 1997 1998
Goin' Down To Memphis	1994	No Deeper Blue	1994
Gone Gone Blues	Unknown	At My Window	1987
Gone Too Long	1994	No Deeper Blue In Pain	1994 1999
Lover's Lullaby	1994	No Deeper Blue The Highway Kind In Pain	1994 1997 1999
Marie	Unknown	No Deeper Blue Live at McCabe's Abnormal Texas Rain Poet Legend	1994 1996 1998 2001 2001 2003
Still Looking For You	1985	At My Window The Highway Kind	1987 1997
The Hole	1994	No Deeper Blue Live at McCabe's The Highway Kind	1994 1996 1997

(Van Zandt Decl. ¶ 24; Exhs. 4, 12.)

Discovery Between Plaintiffs and Eggers

As established above, Plaintiffs were able to settle all claims with all Defendants except for Eggers and for Egge, which is in bankruptcy. (Perkins Decl. ¶¶ 6-8.) Eggers has been active in the litigation. For example, he has twice moved (unsuccessfully) for a preliminary injunction. Moreover, the Court's original schedule has been extended a number of times, mostly at Eggers' request. For example, the discovery period was extended by 3 months (over Plaintiffs' objection) at Eggers' request, to end on May 31, 2007. (Perkins Decl. ¶. 9.) Again at Eggers' request, Judge Ellis further extended discovery, allowing Eggers until June 15, 2007 to complete all depositions.² During the discovery period, Plaintiffs and Eggers engaged in extensive

² Eggers never took a single deposition. (Perkins Decl. ¶ 10.)

documentary discovery. Eggers served no less than 92 Document Requests and 20 Interrogatories. (Perkins Decl. ¶ 11.) Plaintiffs served timely responses and objections and produced in excess of 2700 pages of documents. (Perkins Decl. ¶ 11.) Meanwhile, Eggers did not produce a single document in response to discovery, claiming not to have any responsive documents in his possession, custody or control. (*Id.* ¶ 12.) By Order dated June 26, 2007, Judge Ellis denied Eggers' most recent request to (again) extend the discovery period and set a deadline of July 17, 2007 to make any discovery motions. (Perkins Exh. 11.)

SUMMARY OF ARGUMENT

The Eggers Counterclaim is frivolous and is brought in bad faith. Eggers has maintains that 46 songs were stolen from Columbine when the undisputed documentary evidence shows that Eggers knew that 36 of such songs *were* in fact in Columbine through 1996, when Eggers sold his interest therein. As for the Claimed Non-Columbine Songs, the undisputable documentary evidence demonstrates that all but three of them were created outside of the term of the Publishing Agreement. As to the remaining three, Eggers, who has the burden of proof on this issue, has produced *no evidence* to demonstrate that they were composed within the time period set by the Publishing Agreement.

Further dooming the Eggers Counterclaim is the Copyright Act's strict three-year statute of limitations on claims of copyright ownership. All of the Claimed Non-Columbine Songs have been included on multiple albums since as early as 1987. In 1996, when he executed the Confirmation of Interests as a precursor to his sale of his interest in the Columbine Songs, Eggers was in a position to ensure that all songs to which he was entitled was included in the Columbine catalog. If his claim that songs were "stolen" from Columbine were true – which it is not – the run-up to his sale of his interest in the Columbine Songs was the time to bring the claim he asserts now on his Counterclaim. The Copyright Act's statute of limitations requires that such claims are now extinguished.

On Plaintiffs' claim of copyright infringement, there is no dispute that close to 200 hundred separate works owned by Plaintiffs were infringed by the Infringing Phonorecords. Eggers' co-defendants – TMW, TMC, and his daughter, Mary Eggers – have admitted this in a Consent Judgment. The documentary evidence (as well as the judicial admission of TMW),

establish beyond cavil that Eggers was in a position to supervise – and to prevent – the infringement, thus making him jointly and severally liable for copyright infringement.

I. LEGAL STANDARD ON SUMMARY JUDGMENT.

A district court may grant summary judgment if it is satisfied that “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact. *See Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir.1995). No alleged factual issue will defeat a motion for summary judgment unless it goes to a *genuine issue of material fact*. *Anderson*, 477 U.S. at 247-248. “Specifically, the nonmoving party cannot rely on mere allegations, denials, conjectures, or conclusory statements, but present affirmative and specific evidence showing that there is a genuine issue for trial.” *Scheckells*, 2006 U.S. Dist. LEXIS at *12. *See also Cifarelli v. Village of Babylon*, 93 F.3d 47, 51 (2d Cir.1996) (“conclusory allegations, speculation or conjecture will not avail a party resisting summary judgment.”) Under the Supreme Court’s seminal decision in *Celotex*, in cases where the non-moving party has the burden of proof at trial, “the burden on the moving party may be discharged by ‘showing’ – that is, pointing out to the district court – that there is an *absence* of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (emphasis added). Once the movant meets its initial burden of demonstrating the absence of a genuine issue of material fact, the non-movant “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

II. THE EGGERS COUNTERCLAIM IS FRIVOLOUS AND SHOULD BE DISMISSED

A. Eggers Sold His Interest In The Vast Majority Of The Claimed Songs.

Eggers asserts that, at the time Columbine was in existence, the following claimed Columbine Songs should have been a part of the Columbine Catalog. (Perkins Exh. 10.)

At My Window
Snowin’ on Raton

Spider
When She Don’t Need Me

Highway Kind
Mr. Mudd & Mr. Gold

Blue Wind Blue
Ain't Leavin' Your Love
Buckskin Stallion Blues
Little Sundance #2
Still Looking For You
Gone Gone Blues
Catfish Song
Rex's Blues
No Place To Fall
White Freightliner Blues
Snake Song
Loretta
Two Girls

Pueblo Waltz
Upon My Soul
Blaze's Blues
Goin' Down To Memphis
Dollar Bill Blues
Gone Too Long
A Song For
Brother Flower
Flyin' Shoes
Blue Ridge Mountains
Greensboro Woman
Heavenly House Boat Blues
High, Low & In Between

No Deal
Standin'
To Live Is To Fly
Two Hands
When He Offers His Hand
You Are Not Needed Now
German Mustard
If I Needed You
No Lonesome Tune
Pancho & Lefty
Silver Ships Of Andilar
Lover's Lullaby
Marie
The Hole

Eggers is correct as to the following 36 songs:

At My Window
Snowin' on Raton
Blue Wind Blue
Buckskin Stallion Blues
Little Sundance #2
Catfish Song
Rex's Blues
No Place To Fall
White Freightliner Blues
Snake Song
Loretta
Two Girls

Spider
When She Don't Need Me
Pueblo Waltz
Upon My Soul
Dollar Bill Blues
Brother Flower
Flyin' Shoes
Blue Ridge Mountains
Greensboro Woman
Heavenly House Boat Blues
High, Low & In Between
Highway Kind

Mr. Mudd & Mr. Gold
No Deal
Standin'
To Live Is To Fly
Two Hands
When He Offers His Hand
You Are Not Needed Now
German Mustard
If I Needed You
No Lonesome Tune
Pancho & Lefty
Silver Ships Of Andilar

As demonstrated by the documentary evidence, including by the Confirmation signed by Eggers, the above 36 songs were a part of the Columbine Catalog which Eggers co-owned with Plaintiff Jeanene Van Zandt. (Van Zandt Exhs. 1, 11.) However, it is undisputed that in December 1996, Eggers assigned all of his rights – including any copyright rights – in the Columbine Catalog to the Bienstock Publishing Company. (Perkins Exh. 5.) Such assignment expressly includes the above 36 songs. Thus, Eggers cannot claim that he is entitled to any rights in such 36 songs.

Thus, as a matter of law, the Eggers Counterclaim must fail as to the above 36 songs that remained a part of the Columbine Catalog through Eggers' sale of his interest therein.

B. Eggers Cannot Meet His Burden Of Demonstrating That The 10 Claimed Non-Columbine Songs Were Created During The Term Of The Publishing Agreement.

In order to prevail on his claim that the 10 Claimed Non-Columbine Songs should have been a part of the Columbine Catalog at the time Eggers sold his interest therein, Eggers must demonstrate that the Songs fall within the scope of the Publishing Agreement. In other words, Eggers must demonstrate that the Songs were created between June 19, 1978 and June 19, 1983 (the “Term”). Eggers has produced no evidence to support his claim. (Perkins Decl. ¶ 12.)

As demonstrated by the Chart below, according to the Copyright Certificates, 7 of the 10 Claimed Non-Columbine Songs were created outside the term.

SONG	CREATION DATE	ALBUM	RELEASE DATE
A Song For	1994	No Deeper Blue Live at McCabe’s Abnormal	1994 1996 1998
Ain’t Leavin’ Your Love	Unknown	At My Window A Far Cry From Dead	1987 1999
Blaze’s Blues	1990	No Deeper Blue The Highway Kind Abnormal	1994 1997 1998
Goin’ Down To Memphis	1994	No Deeper Blue	1994
Gone Gone Blues	Unknown	At My Window	1987
Gone Too Long	1994	No Deeper Blue In Pain	1994 1999
Lover’s Lullaby	1994	No Deeper Blue The Highway Kind In Pain	1994 1997 1999
Marie	Unknown	No Deeper Blue Live at McCabe’s Abnormal Texas Rain Poet Legend	1994 1996 1998 2001 2001 2003
Still Looking For You	1985	At My Window The Highway Kind	1987 1997
The Hole	1994	No Deeper Blue Live at McCabe’s The Highway Kind	1994 1996 1997

(Van Zandt Decl. ¶ 24; Exh. 3.) The Copyright Act provides that in “any judicial proceedings” a copyright registration “made within five years after first publication of the work” constitutes “*prima facie* evidence” of the facts stated on the certificate. 17 U.S.C. § 401(c). Eggers has presented no evidence to rebut the creation dates listed in the copyright registrations for such songs. (Perkins Decl. ¶ 12; Exhs. __.) As for the remaining songs – “Ain’t Leavin’ Your Love,” “Gone, Gone Blues,” and “Marie” – Eggers has similarly failed to meet his burden as he has produced no evidence that such songs were written during the Term and thus should have been part of the Columbine Catalog.

C. Eggers’ Claim Of Co-Ownership Is Barred By The Copyright Act’s Three-Year Statute Of Limitations.

The Copyright Act provides that “[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507. A plaintiff is time-barred from any claim seeking to assert copyright ownership – whether as a joint or sole owner – three years after accrual of a claim. *Big East Entertainment, Inc. v. Zomba Enterprises, Inc.*, 453 F. Supp.2d 788, 794 (S.D.N.Y. 2006). A finding that a claim for a declaration of sole or co-ownership of copyright is time-barred, also disposes of any “remedies that would flow from such a declaration.” *Merchant v. Levy*, 92 F.3d 51, 56 (2d Cir. 1996). “A cause of action accrues when a plaintiff knows or has reason to know of the injury upon which the claim is premised.” *Merchant*, 92 F.3d at 56. In this case, there can be no dispute that Eggers knew, or should have known, of the existence of the Claimed Non-Columbine Songs well before three years prior to having brought the Eggers Counterclaim. First, as set forth in the Chart at p. 11 *supra*, each of the Songs was released publicly on CDs many years ago. Indeed, at least one of the CDs (Texas Rain) containing the Claimed Non-Columbine Songs, was produced by Eggers himself. (Van Zandt Exh. 4.)

Moreover, in 1996 when Eggers decided to sell his interest in the Columbine Catalog, he could have inquired as to whether additional songs should have been included in that catalog. In that regard, this case is quite similar to this Court’s decision in *Minder Music, Ltd. v. Mellow*

Smoke Music Co., 1999 U.S. Dist. LEXIS 16001, 5-7 (S.D.N.Y. 1999). In that case, the Court, in granting defendant's motion for summary judgment, held "the evidence in this case shows that plaintiff could have investigated the merits of defendants' ownership claim in 1990, as soon as it acquired its own ownership interests." (*Id.* at *5.) The same can be said here – Eggers could have investigated the provenance of the Claimed Non-Columbine Songs at any time after their initial – and repeated – release. He also had an opportunity to do this in 1996 when he signed the Confirmation of Interests prior to selling his interest in the Columbine Catalog. He simply failed to do so.

In dismissing the plaintiff's claim of co-ownership, the Court in *Minder Music* stated

This action disputes copyright ownership rights that have been uncontested for twenty-four years, and seeks relief against a party who appears to be a good faith purchaser of those rights. The Court finds that dismissal of the action "promotes the principles of repose integral to a properly functioning copyright market' [and] is also consistent with the Supreme Court's recognition that 'Congress' paramount goal in revising the 1976 [Copyright Act] was] enhancing predictability and certainty of copyright ownership.'" See *Netzer*, 963 F. Supp. at 1315 (S.D.N.Y. 1997) (quoting *Merchant*, 92 F.3d at 56 and *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989)).

Minder Music, 1999 U.S. Dist. LEXIS 16001, at * 5-7.

The same equities are present here. The copyrights at issue have been uncontested for more than ten years. The Plaintiffs are the equivalent of good faith purchasers of such copyrights, having received them through a divorce settlement (in the case of Plaintiff Jeanene Van Zandt) or by will (in the case of the Van Zandt Children). Eggers – who considers himself the expert in all things Townes Van Zandt – cannot create a genuine issue of material fact here by claiming he was not aware of his alleged claim until Plaintiffs brought their law suit against him. The objective, undisputed facts, make clear that Eggers knew, or should have known, as early as December 1996 (when he sold his interest in the Columbine Catalog) that Van Zandt did not consider Eggers to own any portion of the Claimed Non-Columbine Songs. As a result, the Eggers Counterclaim also fails because it is barred by the statute of limitations.

D. To The Extent The Eggers Counterclaim Can Be Read To Include An Allegation Of Fraud Against Plaintiffs, Such Claim Is Without Merit.

Eggers peppers his counterclaim with allegations of “fraud” against Plaintiffs. (Perkins Exh. 3; ¶ 4.) However, in response to Plaintiffs’ Interrogatory requesting Eggers articulate “all facts” to support such contention, Eggers gave the following limited response:

Plaintiff’s [sic] copyrighted in their name or entities owned or controlled by them songs that were the joint property of Kevin Eggers and Townes Van Zandt and illegally enriched themselves from illegally obtained income.

(Perkins Exh. 10.)

As established above, Eggers is substantively incorrect as to his allegation that he has any current co-ownership claim to any of the Claimed Songs. Moreover, Eggers’ description of his claim does not support a claim for fraud.

Under New York law, “[t]o sustain a cause of action alleging fraud, a party must show a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.” *Cayuga Partners, LLC v. 150 Grand, LLC*, 305 A.D.2d 527, 759 N.Y.S.2d 347, 348 (App. Div. 2003); *Buxton Mfg. Co., Inc. v. Valiant Moving & Storage, Inc.*, 239 A.D.2d 452, 657 N.Y.S.2d 450, 451 (App. Div. 1997).

Eggers has adduced no evidence to support any of these elements. First, Eggers has produced no evidence to support any claim that any of the Plaintiffs had any involvement in perpetrating any misrepresentation or material omission of fact. (Perkins Exh. 10.) Nor can Eggers meet his burden of demonstrating that any of the Plaintiffs committed any of the alleged acts for the purpose of inducing him to rely on such acts. Indeed, the entirety of the alleged fraud, according to Eggers, was Plaintiffs having “copyrighted” songs in names of other entities and in having “enriched themselves” from such act. Eggers has not alleged – nor can he – that he relied upon any such acts by Plaintiffs. In sum, his fraud claim is also entirely without merit.

III. EGGERS HAS INFRINGED PLAINTIFFS' COPYRIGHTS IN NEARLY 200 VAN ZANDT COMPOSITIONS

In order to bring an action for copyright infringement, a plaintiff must own or have applied for a copyright registration. 17 U.S.C. § 411. “In asserting a claim of copyright infringement, the plaintiff must show (i) ownership of a valid copyright; and (ii) unauthorized copying of the copyrighted work.” *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003) (internal citations omitted). A copyright registration constitutes *prima facie* evidence of ownership of a valid copyright. *Fonar Corp. v. Domenick*, 105 F.3d 99, 104 (2d Cir. 1991).

The gravamen of Plaintiffs' copyright claims is Defendants' – including Eggers' – failure to obtain mechanical licenses and to pay mechanical royalties. (SAC ¶¶ 73-88.) Section 115 of the Copyright Act governs the issuance of mechanical licenses and provides for two different methods for obtaining mechanical licenses. The first is to obtain a “compulsory license.” 17 U.S.C. § 115(b). A record company may obtain a compulsory license without the consent of the copyright owner by following the procedure set out in the statute. 17 U.S.C. § 115(b)(1). However, failure to file a notice of intention to obtain a compulsory license before distributing the records “forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement....” 17 U.S.C. § 115(b)(2). The second method of obtaining a mechanical license is by direct negotiation between the record company the owner of copyright in the compositions included on the sound recording. *See id.* As set forth in Section 115 of the Copyright Act, the distribution of phonorecords without a mechanical license gives rise to a claim of infringement under Section 501 of the Copyright Act and such claims are “fully subject to the remedies provided in sections 502 through 506 and 509.” 17 U.S.C. § 115 (b)(2).

Plaintiffs meet all of the requirements to prevail on their copyright claims. First, Plaintiffs own copyright registrations for nearly every Composition included on any of the Infringing Recordings. (Van Zandt Exhs. 3-4.) Second, as admitted by Eggers' co-defendants in the Consent Judgment, since 2000 the Defendants unlawfully created the Infringing

Phonorecords, they failed to obtain mechanical licenses for most of the Van Zandt Compositions contained thereon, and they paid no mechanical royalties for use of any of the Van Zandt Compositions included on any of the Infringing Recordings. (Perkins Exh. ¶ 5.)

The undisputed evidence further establishes that Eggers is liable for vicarious copyright infringement and thus is jointly and severally liable with his co-infringers. Vicarious copyright infringement

is established if it is shown that a party, with knowledge of infringing activity, induces, causes, or materially contributes to the infringing conduct of another. *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Encyclopaedia Britannica Educational Corp. v. Crooks*, 558 F. Supp. 1247 (W.D.N.Y. 1983). The liability of one found guilty of vicarious infringement is joint and several with all infringers. “As all united in infringing, all are responsible for the damages resulting from the infringement.” *Gross v. Van Dyk Gravure Co.*, 230 F. 412 (2d Cir. 1916), quoted in *Gershwin*, *supra*, at 1162 n.7.

Universal City Studios, Inc. v. Nintendo Co., 615 F. Supp. 838, 857 (S.D.N.Y. 1985). *See also* 17 U.S.C. § 504 (c)(1). In addition, “an individual, including an officer ... of a corporation who participates in the acts constituting infringement is personally liable, jointly and severally with the corporate defendant.” *Samet & Wells, Inc. v. Shalom Toy Co., Inc.*, 429 F. Supp. 895, 904 (E.D.N.Y. 1977), *aff’d*, 578 F.2d 1369 (2d Cir. 1978). Moreover, “all persons and corporations who participate in, exercise control over or benefit from an infringement are jointly and severally liable as copyright infringers.” *Sigma Photo News, Inc. v. High Soc. Magazine, Inc.*, 778 F.2d 89, 92 (2d Cir. 1985); *see also Luft v. Crown Publishers, Inc.*, 772 F. Supp. 1378, 1379 (S.D.N.Y. 1991) (stating that “a company president who supervises the selection, manufacture, distribution and sale of infringing recordings is jointly and severally liable for damages caused by the infringement”). *See also Capitol Records, Inc. v. Wings Digital Corp.*, 218 F. Supp. 2d 280, 285 (E.D.N.Y. 2002).

The undisputed evidence establishes that Eggers: (1) had knowledge of the infringing activity, (2) either induced, caused, or materially contributed to the infringing conduct, (3) was,

at least part of the time, an officer of one of the other infringing Defendants, and (4) exercised control over the infringement.

According to TMW, Eggers served as its Chief Executive Officer until November, 2004 – at least four years into the release of the Infringing Phonorecords. Indeed, it was Eggers who responded to Plaintiffs’ Music Administrator’s letter of January 24, 2003, demanding that Tomato Records obtain mechanical licenses for use of the Van Zandt Compositions included on the Infringing Phonorecords. (Van Zandt Ex. 5.) Indeed, Eggers *negotiated* on behalf of Tomato Records, stating in an e-mail dated February 12, 2003, that “[w]e shall sign and return all new mechanical licenses that have been submitted to us by the Fox office which we presume have been approved by your office with the exception of the three albums noted above.” (Van Zandt Ex. 6.) Of course, notwithstanding Eggers’ representation, virtually no mechanical licenses were entered into and no mechanical royalties paid for any of the Infringing Phonorecords, even for those that Eggers did not dispute were governed by the higher royalty rate. (Perkins Ex. 5.)

It is thus clear from the contemporaneous correspondence that Eggers was the “face” of Tomato Records as recently as February 2003, and that he had decision-making power with respect to Tomato Records’ decision not to obtain mechanical licenses and not to pay mechanical royalties.

Eggers is equally liable for the Infringing Phonorecords because he claims to have licensed the Van Zandt Masters to Tomato Records.³ As explained in a leading copyright treatise, “a licensor will be liable as a contributory infringer where his licensee pursuant to such license infringes a copyright of a third party by making unauthorized copies or unauthorized performances.” 3-12 *Nimmer on Copyright* § 12.04. Such is exactly the case here. Eggers claims to have licensed the Masters that were unlawfully compiled, reproduced and distributed

³ Although Defendant TMW held itself out as the owner of all Van Zandt Masters at issue in this case, Eggers, in his cross-complaint, has alleged that *he* remains the owner of such Masters. The claim appears to be entirely without merit.

by the remaining defendants. Thus, on this separate basis, Eggers is liable for copyright infringement.

CONCLUSION

In light of the foregoing, Plaintiffs respectfully request that their motion be granted in its entirety and that: (1) the Eggers Counterclaim against Plaintiffs be dismissed with prejudice and (2) judgment be entered against Eggers on Plaintiffs' claim of copyright infringement.

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