

19-3335-CV

United States Court of Appeals for the Second Circuit

CHRISTIAN CHARLES,

Plaintiff-Appellant,

v.

JERRY SEINFELD, COLUMBUS 81 PRODUCTIONS, INC.,
(AND NEW MATERIAL, LLC), COMEDIANS IN CARS, LLC,
SONY PICTURES TELEVISION INC., NETFLIX, INC., EMBASSY ROW, LLC,

Defendants-Appellees,

EMBASSY ROW, MICHAEL DAVIES, CEO,

Defendant.

On Appeal From The United States District Court
For The Southern District Of New York, No. 18-cv-1196 (AJN)

BRIEF FOR DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Columbus 81 Productions, Inc. (incorrectly sued as “Columbus 81 Productions, Inc. (and New Material, LLC)”) states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock. Defendant-Appellee Comedians in Cars, LLC states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock. Defendants-Appellees Sony Pictures Television Inc. and Embassy Row, LLC state that they are indirect wholly owned subsidiaries of Sony Pictures Entertainment Inc., which is an indirect wholly owned subsidiary of Sony Corporation. Sony Corporation is a publicly traded company (NYSE: SNE). It does not have a parent corporation, and no publicly held corporation owns more than 10% percent of its stock. Defendant-Appellee Netflix, Inc. states that it is a publicly traded company (NASDAQ: NFLX). It does not have a parent corporation, and no publicly held corporation owns more than 10% percent of its stock.

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INTRODUCTION

Defendant-Appellee Jerry Seinfeld created the award-winning talk show *Comedians in Cars Getting Coffee* (the “Show”) and is the sole owner of the Show’s copyrights. Mr. Seinfeld hired Plaintiff-Appellant Christian Charles to direct the pilot episode of the Show (the “Pilot”) and Plaintiff’s involvement in the Show undisputedly ended before the Show was publicly released in July 2012. Plaintiff now implausibly claims that he is the true author and owner of the Show’s copyrights. But Plaintiff did not bring this lawsuit until February 2018, over five and a half years after the Show premiered and only shortly after he learned that Netflix, Inc. (“Netflix”) made a lucrative deal to license the Show. The district court held that Plaintiff’s opportunistic effort to capitalize on the success of the Show is barred by the Copyright Act’s statute of limitations. That judgment should be affirmed.

The district court correctly held that this case is controlled by this Court’s decisions in *Kwan v. Schlein*, 634 F.3d 224 (2d Cir. 2011) and *Simmons v. Stanberry*, 810 F.3d 114 (2d Cir. 2016) (per curiam). Those decisions hold that when the “backbone” of a plaintiff’s copyright claims is a contested assertion of ownership of the copyrights, the Copyright Act’s three-year limitations period runs from when the plaintiff reasonably should have known that ownership was in dispute. *Kwan*, 634 F.3d at 229; accord *Simmons*, 810 F.3d at 116.

Here, Plaintiff’s operative complaint alleges that, in 2012, Mr. Seinfeld flatly rejected Plaintiff’s requests for “backend involvement” in the Show and made clear that Plaintiff did not have “more than a ‘work-for-hire’ directing role” and would be compensated only through his “directing fee.” A-31 ¶¶ 69–70.¹ Plaintiff’s wife and business partner then withdrew the request for “backend” compensation and proceeded to negotiate that directing fee, writing “[t]he company has agreed to *fully release any and all additional fees, damages, obligations etc.* if the total of \$107,734.41 for the negative costs is received (net 15).” A-118–19 (emphasis added). Plaintiff’s complaint acknowledges that Mr. Seinfeld agreed to the terms of that release and paid that directing fee in April 2012. A-33 ¶¶ 78–79. The Show then premiered in July 2012, to great critical acclaim, but with no credit ever provided to Plaintiff. And, as Plaintiff acknowledges, he has never been paid any royalties relating to the Show.

Plaintiff’s lawsuit indisputably centers on his outlandish claim that he is the owner of the copyrights in the Show. But, as the district court correctly concluded, facts drawn from Plaintiff’s own complaint establish that Plaintiff reasonably should have known his claim of an ownership interest in the Show was in dispute no later than 2012, when Mr. Seinfeld expressly rejected the notion of Plaintiff having any

¹ “A-__” refers to the Joint Appendix, filed on December 13, 2019. “Br. __” refers to Plaintiff’s opening brief, filed on December 13, 2019.

“backend involvement” and made clear that Plaintiff did not have “more than a ‘work-for-hire’ directing role.” The Show then premiered with no mention of Plaintiff’s supposed role as a creator. *Kwan* and *Simmons* thus preclude his lawsuit. And so does sound copyright policy, which the Act’s three-year statute of limitations implements by ensuring that any claims seeking ownership in a work are timely adjudicated, furnishing the certainty and repose that are essential to the development and distribution of creative works.

Plaintiff’s efforts to escape the grasp of this Court’s precedents lack merit. Plaintiff’s notion that Mr. Seinfeld has never disputed that Plaintiff is the author of the Show is risible and, indeed, disproven by Plaintiff’s own allegations that Mr. Seinfeld has held himself out to the public as the Show’s sole creator since 2012. Plaintiff’s further contention that *Kwan* and *Simmons* are limited to the factual circumstance of a plaintiff who acknowledges that the defendant is an author of the work in question is incorrect and makes no sense as a matter of copyright policy. Finally, Plaintiff’s new factual assertions that he was *subjectively* unaware that Mr. Seinfeld disputed his ownership in the Show’s copyrights come too late, contradict allegations in the operative complaint, and are legally irrelevant since the legal standard is objective, turning on whether Plaintiff reasonably should have known ownership was in dispute.

The judgment of the district court should be affirmed.

COUNTERSTATEMENT OF ISSUES

In 2012, Mr. Seinfeld twice rejected Plaintiff's demands for an ownership interest in the Show and Defendants distributed the Show without Plaintiff's authorization and without giving any credit to Plaintiff or paying him. This Court has held that where copyright claims center around ownership in the copyrights, the Copyright Act's statute of limitations, 17 U.S.C. § 507(b), bars claims not made within three years of when ownership came into dispute. Is Plaintiff's 2018 lawsuit, which centers on Plaintiff's claim to be the owner of the Show's copyrights, time-barred?

COUNTERSTATEMENT OF THE CASE²

I. FACTUAL BACKGROUND.

Recognized as one of the best stand-up comedians of all time, Jerry Seinfeld is also an award-winning actor, writer, producer, and director. Mr. Seinfeld conceived of the concept for the Show in July 2000, during a cross-country road trip he took in a 1967 Volkswagen Beetle with a fellow comedian, Barry Marder. Eleven years later, Mr. Seinfeld "called [Plaintiff] in September [2011] to work on the [Show's] concept" and direct the pilot episode, A-119, which also featured Mr.

² Nearly all of the allegations in Plaintiff's "Statement of Facts," Br. 7–14, are drawn from six declarations and affidavits that Plaintiff impermissibly attached to his brief in opposition to Defendants' motion to dismiss. See A-134–216. Plaintiff only cites to his Second Amended Complaint ("SAC") once in his recitation of the "facts." See Br. 12 (citing A-31).

Seinfeld and Mr. Marder driving in a small car. As conceived and executed, *Comedians in Cars Getting Coffee* is an unscripted talk show where Mr. Seinfeld and a fellow comedian drive in a car to get coffee and engage in comedic banter.

On January 24, 2012, Plaintiff alleges he and Mr. Seinfeld “presented the Pilot to Embassy Row,” which agreed to produce the Show. A-30 ¶ 63. After this presentation, Plaintiff began seeking more than a director’s salary. A-31 ¶ 69. Specifically, “[i]n January and February of 2012, [Plaintiff] claims that he communicated his request ‘for compensation and backend involvement’ with the show.” A-270 (quoting A-31 ¶ 69). As the district court noted, “this is the point at which things [went] sour.” *Id.* In February 2012, Mr. Seinfeld called Plaintiff and “[a]ccording to the SAC, . . . ‘expressed outrage at the notion that [Plaintiff] would have more than a “work for hire” directing role.’” *Id.* (quoting A-31 ¶ 70). “The SAC further states that Seinfeld characterized [Plaintiff] as ‘ungrateful’ and told [Plaintiff] that he ‘should expect to be compensated through his directing fee.’” *Id.* (quoting A-31 ¶ 70). “They had another conversation along similar lines a few days later.” *Id.* (citing A-32 ¶ 73). On that second call, Mr. Seinfeld maintained his position that Plaintiff would be “paid as a director” and would not receive “backend compensation.” A-32 ¶ 73.

Two months later, Plaintiff released all claims related to the Show in exchange for a lump-sum payment. The SAC acknowledges that on April 11 and 12, 2012,

Plaintiff’s wife and business partner, Anne Estonilo, emailed Mr. Seinfeld’s sister and business associate, Carolyn Liebling, because she “needed to recoup” Plaintiff’s production expenses. A-33 ¶ 77. The SAC then alleges that “Leibling [sic] sent Estonilo an email that Seinfeld agreed to pay \$107,734 for production preparation from October 2011 through January 2012” and that “Leibling [sic] sent payment in the stated amount to mouseROAR.”³ A-33 ¶¶ 78–79.

A review of that April 2012 email chain—which is incorporated by reference in the SAC and therefore can be reviewed in its entirety—demonstrates that Mr. Seinfeld’s payment terminated any further involvement of Plaintiff in the Show and “read in its entirety . . . undermine[s] the legitimacy of [Plaintiff’s] claim.” *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016) (citation omitted). On April 3, 2012, Estonilo emailed Liebling, writing that she has “been left to close the account” on the “COMEDIANS IN CARS Project” in lieu of “having outside representation handle this issue.” A-118. Estonilo confirmed she surrendered “all production learnings and process to the Embassy Row producers” and sought to recoup “costs outstanding from mouseROAR’s work on the project which spanned over five months from September 2011 to January 2012.” *Id.* To justify these costs, Estonilo then writes, “[t]o provide background on our involvement, *Jerry called [Plaintiff]*

³ MouseROAR LLC is Plaintiff’s production company. A-20 ¶ 16.

in September to work on the [Show] concept.” A-119 (emphasis added). Estonilo then wrote, “[i]n lieu of the backend discussed in December and the opportunity to direct additional episodes, [Plaintiff’s] non-shoot day rate against well over 40 full days committed to the project, brings the lost income to over \$100,000. . . . Unfortunately at this stage, I must work to recoup the costs that are outstanding to mouseROAR and [Plaintiff].” *Id.* (emphasis added). This confirms that Plaintiff expressly withdrew his request for “backend” compensation and “the opportunity to direct additional episodes”—thus ceasing his future involvement in the Show—in exchange for a lump sum for expenses and his directing fees.

On April 4, 2012, Liebling requested that Estonilo “detail all the expenses so that everything is perfectly clear on paper.” A-118. On April 11, 2012, Estonilo replied to Liebling, “[p]er your request, I’m forwarding the internal and confidential Profit and Loss report,” which included Plaintiff’s “salaried rate of \$1448.88 per day against 44.75 days reported on his timecard for the period worked.” *Id.* This confirmed that Plaintiff was exclusively compensated as a “salaried” director. Most significantly, Estonilo proposed the following release: “The company has agreed to *fully release any and all additional fees, damages, obligations etc.* if the total of \$107,734.41 for the negative costs is received (net 15).” *Id.* (emphasis added). Mr. Seinfeld then agreed to those terms and “Leibling [sic] sent payment in the stated amount to [Plaintiff].” A-33 ¶¶ 78–79. In closing, Estonilo wrote, “I’m sure you

can understand why I would like to handle this quickly and move forward. [Plaintiff] and I wish the best for this project and everyone involved.” A-118.

As the district court observed, after “these conversations, [Plaintiff] had no further involvement in the [Show], which became a successful web series that continues to produce new episodes.” A-271. “Seinfeld and other Defendants went on to produce and distribute the show without giving any credit to [Plaintiff].” A-275. On July 19, 2012, the Show premiered on Crackle, Sony Pictures Television Inc.’s (“SPT”) online streaming service, to critical acclaim. A-38 ¶¶ 93, 96.

Plaintiff “concedes” that Mr. Seinfeld “claimed to be the ‘creator’ of the [S]how in the press.” A-271 (quoting A-39 ¶ 98). Plaintiff also admits that he never received any royalty payments from the Show. A-37 ¶ 85; *see also* Br. 13–14. For the next half decade, between April 2012 and December 27, 2017, Plaintiff did not object, voice any complaint, or reserve rights. Instead, he did nothing and said nothing until “Netflix inked a lucrative new deal for the show to join their platform, leading [Plaintiff] to contact Seinfeld” in December 2017. A-275.

II. PROCEDURAL HISTORY.

A. Defendants’ Motion To Dismiss.

Plaintiff filed this lawsuit *pro se* on February 9, 2018. The SAC, filed in September 2018 with the assistance of counsel, alleges that Plaintiff—not Mr. Seinfeld—is the “sole author/owner or a joint author/owner” of the Show’s

copyrights, A-17 ¶ 2, and asserts claims for copyright infringement, joint authorship, injunctive relief, and several state law causes of action. A-39–51.⁴

Defendants moved to dismiss the SAC for failure to state a claim. Contrary to Plaintiff’s erroneous assertion that Defendants’ “motions rest[ed] solely on the argument that various actions by Seinfeld triggered the running of the limitations period,” Br. 6, Defendants’ motion to dismiss the SAC also argued that Plaintiff failed to allege a protectable copyright interest, A-90–92, that Plaintiff’s copyright registrations are fraudulent and invalid, A-92–93, that Plaintiff released all claims to the Show, A-94–95, and that Plaintiff did not state a claim for his state law causes of action, A-95–97.

B. The District Court Decision.

The district court granted Defendants’ motion and dismissed Plaintiff’s copyright claims with prejudice and the state law claims without prejudice. A-277. Relying on this Court’s decisions in *Kwan* and *Simmons*, the district court ruled that Plaintiff’s copyright claims were time-barred because he “was on notice that his ownership claim had been repudiated since at least 2012.” A-276. Relying exclusively on the allegations as pled in the SAC, the district court correctly found that the following two admissions triggered the statute of limitations: (1) that Mr.

⁴ Michael Davies, CEO of Embassy Row, was terminated as a Defendant in this action as of June 22, 2018, *see* A-2. The SAC does not name Mr. Davies as a Defendant. *See* A-16–19.

Seinfeld, in February 2012, “twice rejected [Plaintiff’s] request for backend compensation and made it clear that [Plaintiff’s] only involvement was to be on a ‘work-for-hire’ basis” and (2) that, after the Show’s July 2012 premiere, Plaintiff “was aware that the show was being produced and that he was not being credited on it.” A-274–76. The district court also found that Plaintiff’s “attempts to distinguish Second Circuit precedent” were “unavailing.” A-273.

Finding that Plaintiff “ha[d] had multiple opportunities to amend his complaint in the face of Defendants’ timeliness arguments and ha[d] not made any further amendment requests,” the district court dismissed the copyright claims with prejudice. A-276. After dismissing the copyright claims, the district court “further decline[d] [to exercise] supplemental jurisdiction over the remaining state law claims.” *Id.* (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *In re Merrill Lynch Ltd. P’ships Litig.*, 154 F.3d 56, 61 (2d Cir. 1998) (per curiam)). Because Plaintiff’s copyright claims were time-barred as a matter of law, the district court did not reach the Defendants’ other bases for dismissal.

This appeal followed.⁵

⁵ Plaintiff does not argue that he should have been permitted an additional opportunity to amend his complaint. That issue accordingly is waived. *See Cabello-Rondon v. Dow Jones & Co.*, 720 F. App’x 87, 89 (2d Cir. 2018) (summary order) (finding argument waived where plaintiff “did not in his opening brief challenge the district court’s decision to . . . dismiss with prejudice”). Nor does he “challenge on appeal the district court’s refusal to exercise supplemental jurisdiction over his state law claims, and so . . . this issue

STANDARD OF REVIEW

This Court reviews “the grant of a motion to dismiss *de novo*.” *Mahan v. Roc Nation, LLC*, 634 F. App’x 329, 330 (2d Cir. 2016) (summary order). “A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true . . . show that relief is barred by the applicable statute of limitations.” *Wilkov v. Ameriprise Fin. Servs., Inc.*, 753 F. App’x 44, 46 (2d Cir. 2018) (summary order) (quoting *Jones v. Bock*, 549 U.S. 199, 215 (2007)). A court may consider “documents attached as exhibits, incorporated by reference, or that are ‘integral’ to the complaint.” *McDonald v. West*, 138 F. Supp. 3d 448, 453 (S.D.N.Y. 2015) (citing *DiFolco v. MSNBC Cable LLC*, 622 F.3d 104, 111 (2d Cir. 2010)), *aff’d*, 669 F. App’x 59 (2d Cir. 2016) (summary order).

SUMMARY OF ARGUMENT

The district court correctly applied this Court’s decisions in *Kwan* and *Simmons*. The judgment of dismissal should be affirmed.

A. The district court correctly held—and Plaintiff does not dispute—that the primary copyright dispute here concerns the *ownership* of the Show, not copying of Plaintiff’s alleged work. A-273. Mr. Seinfeld is the sole owner of the Show’s copyrights. Defendants steadfastly dispute that Plaintiff owns a valid copyright for

[is] waived.” *Rodriguez v. Cty. of Nassau*, 547 F. App’x 79, 81 n.1 (2d Cir. 2013) (summary order).

any aspect of the Show. A-83. And “[w]here, as here, a plaintiff’s copyright ownership is not conceded (and, in fact, the defendant holds a prior copyright registration certificate for the disputed work), copyright ownership, and not infringement, is the gravamen of the plaintiff’s claim to which the statute of limitations is applied.” *Kwan*, 634 F.3d at 230 (alteration in original) (quoting *Ortiz v. Guitian Bros. Music Inc.*, 2008 WL 4449314, at *3 (S.D.N.Y. Sept. 29, 2008)).

B. Relying on this Court’s precedent, the district court correctly ruled that Plaintiff’s copyright claims were time-barred because Plaintiff “was on notice that his ownership claim had been repudiated since at least 2012,” A-276, nearly six years before Plaintiff filed this action. “An ownership claim accrues only once, when ‘a reasonably diligent plaintiff would have been put on inquiry as to the existence of a right.’” *Kwan*, 634 F.3d at 228 (quoting *Stone v. Williams*, 970 F.2d 1043, 1048 (2d Cir. 1992)). In *Wilson v. Dynatone Publ’g Co.*, this Court reaffirmed its flexible standard for determining the “types of events that can put a potential plaintiff on notice and thereby trigger the accrual of an ownership claim: public repudiation; private repudiation in communications between the parties; and implicit repudiation ‘by conspicuously exploiting the copyright without paying royalties.’” 892 F.3d 112, 118 (2d Cir. 2018) (quoting *Gary Friedrich Enters., LLC v. Marvel Characters, Inc.*, 716 F.3d 302, 317 (2d Cir. 2013)). Here, the SAC’s allegations provide at least

three separate and distinct repudiations—private, public, and implicit—that put Plaintiff on clear notice and thereby triggered the accrual of an ownership claim:

(1) Private Repudiation: The district court correctly found that Plaintiff’s copyright ownership claim accrued when Mr. Seinfeld twice rejected Plaintiff’s demands for an ownership interest in the Show and made it clear that Plaintiff’s only involvement would be on a “work-for-hire” basis.

(2) Public Repudiation: The district court correctly found that Plaintiff’s copyright ownership claim accrued when Defendants produced and distributed the Show without crediting Plaintiff. Plaintiff’s admissions that Defendants publicly released the Pilot episode without Plaintiff’s authorization and that Mr. Seinfeld had claimed to be the “creator” of the Show in the media also constitute separate and distinct public repudiations.

(3) Implicit Repudiation: Although the district court did not address it—the private and public repudiations were sufficient to dispose of the case—Defendants’ public distribution of the Show without paying Plaintiff royalties constitutes yet another basis for accrual.

C. Plaintiff’s arguments on appeal misstate the record and misapprehend the law. Plaintiff asserts two puzzling arguments on appeal: that the district court erred by (1) “implicitly finding” that Mr. Seinfeld “owns the copyright” to the Show, and (2) by finding that Mr. Seinfeld “had the power to trigger the statute of

limitations for [Plaintiff's] assertion of ownership.” Br. 3–4. Plaintiff's first argument is factually incorrect. The district court never made a finding, implicitly or otherwise, that Mr. Seinfeld owns the copyrights to the Show. Plaintiff's second argument simply rejects the legal standard laid down in *Kwan*. That standard turns on the plaintiff's objective awareness of a dispute over ownership. There is nothing untoward or unusual about a defendant's actions placing the plaintiff on notice of the dispute. Indeed, that was the case in both *Kwan* and *Simmons*. And, here, as the district court correctly concluded, Defendants' actions in 2012 would have alerted any reasonable person in Plaintiff's claimed position to the existence of an ownership dispute.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFF'S COPYRIGHT CLAIMS AS TIME-BARRED.

A. The District Court Correctly Found—And Plaintiff Does Not Dispute—That Copyright Ownership Is The Central Issue In This Case.

The district court correctly held that the principal “issue in this case is not the ‘nature, extent or scope, of copying,’” but rather “whether [Plaintiff's] alleged ‘contributions . . . qualify [him] as the author and therefore owner’ of the copyrights in [the Show].” A-273 (quoting *Kwan*, 634 F.3d at 229).

“To maintain an action for infringement, a plaintiff must establish ‘(1) ownership of a valid copyright, and (2) copying of constituent elements of the work

that are original.’ In many infringement cases, the first element (ownership) is not in dispute.” *Kwan*, 634 F.3d at 229 (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). In this case, however, the ownership element is very much disputed. Mr. Seinfeld is the sole owner of the Show’s copyrights. Defendants dispute that Plaintiff owns a valid copyright for any aspect of the Show. Indeed, the district court correctly noted, “Plaintiff does not truly dispute” that the principal issue in this case is copyright ownership. A-273; *see also* Br. 16 (“The central question on this appeal . . . is whether Seinfeld . . . could—by ‘repudiating’ [Plaintiff’s] ownership of rights the Copyright Act had given him—trigger the statute of limitations and compel [Plaintiff] to sue to protect his ownership of that copyright.”). And “[w]here, as here, a plaintiff’s copyright ownership is not conceded (and, in fact, the defendant holds a prior copyright registration certificate for the disputed work), copyright ownership, and not infringement, is the gravamen of the plaintiff’s claim to which the statute of limitations is applied.” *Kwan*, 634 F.3d at 230 (quoting *Ortiz*, 2008 WL 4449314, at *3). “Where . . . the ownership claim is time-barred, and ownership is the dispositive issue, any attendant infringement claims must fail.”⁶ *Id.*

⁶ Plaintiff repeatedly claims that Defendants have never disputed Plaintiff’s authorship of the Show. *See, e.g.*, Br. 2 (“[Defendants’] sole argument boiled down to ‘sorry, I don’t really dispute that you created everything and I created nothing, but you waited too long to sue me; now you get nothing.’”). That is a shocking misrepresentation of Defendants’ position. Defendants dispute nearly

The *Kwan* rule advances sound copyright policy because the timely resolution of ownership disputes is necessary to the development and distribution of creative works. The Copyright Act’s statute of limitations was designed to create a “uniform and certain” period to litigate copyright claims. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014) (citing S. REP. NO. 1014, at 2 (1957); H.R. REP. NO. 2419, at 2 (1956)). Hardly an “arbitrary obstacle[,]” the statute of limitations furnishes the “certainty and repose [that] are essential to the functioning of the copyright market.” *Netzer v. Continuity Graphic Assocs., Inc.*, 963 F. Supp. 1308, 1318 (S.D.N.Y. 1997) (first quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990); then citing *Merch. v. Levy*, 92 F.3d 51, 57 (2d Cir. 1996)). “Such certainty permits individuals to invest in the publication of copyrighted material without undue fear of litigation, and thus serves the ultimate purpose of copyright, which is ‘enriching the general public through access to creative works.’” *Id.* (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994)).

On the other hand, “to allow the putative co-owner to lie in the weeds for years after his claim has been repudiated while large amounts of money are spent

all of Plaintiff’s allegations, especially those concerning the development of the Show. *See, e.g.*, A-83 (“Defendants do not concede that Plaintiff owns a valid copyright for any aspect of the Show.”); A-77 n.3 (“Plaintiff’s material allegations concerning the development and copyright ownership of the Show are false and wholly without merit.”).

developing a market for the copyrighted material” is “inequitable” and frustrates investment in creative works. *Id.* (quoting *Zuill v. Shanahan*, 80 F.3d 1366, 1370–71 (9th Cir. 1996)). Here, SPT and Netflix signed deals with Mr. Seinfeld to stream the Show on their platforms and produce new episodes. *See* A-38 ¶ 96. Plaintiff’s decision to file suit now—nearly six years after he released his claims and five and a half years after the Show premiered—disrupts the certainty of copyright ownership that SPT, Netflix, and others relied upon when they invested considerable time and resources into making the Show a resounding success. This is precisely the type of belated and opportunistic strike suit the statute of limitations is designed to prevent.

B. The District Court Correctly Found That Plaintiff’s Copyright Claims Are Time-Barred.

Claims under the Copyright Act must be brought “within three years after the claim [has] accrued.” 17 U.S.C. § 507(b). “An ownership claim accrues only once.” *Kwan*, 634 F.3d at 228. “[A]ny number of events can trigger the accrual of an ownership claim, including ‘[a]n express assertion of sole authorship or ownership.’” *Id.* (quoting *Netzer*, 963 F. Supp. at 1315). As with claims of sole ownership, “[c]laims of co-ownership typically accrue once there has been an ‘express repudiation’ of ownership.” *Mahan*, 634 F. App’x at 331.

“This Court has identified at least three types of events that can put a potential plaintiff on notice and thereby trigger the accrual of an ownership claim: public repudiation; private repudiation in communications between the parties; and implicit

repudiation “by conspicuously exploiting the copyright without paying royalties.” *Wilson*, 892 F.3d at 118 (quoting *Friedrich*, 716 F.3d at 317); *see also Mahan v. Roc Nation, LLC*, 2015 WL 1782095, at *4 (S.D.N.Y. Apr. 15, 2015) (“[T]he Second Circuit discussed private, public and implied repudiation as alternative forms of ‘express repudiation.’”), *aff’d*, 634 F. App’x 329 (2d Cir. 2016). Here, the SAC’s allegations provide at least three separate and distinct repudiations—private, public, and implicit—that put Plaintiff on clear notice and thereby triggered the accrual of an ownership claim “well before three years prior to filing [his] complaint.” *Parks v. ABC, Inc.*, 341 F. App’x 737, 738 (2d Cir. 2009) (summary order).

1. Private Repudiation: The District Court Correctly Found That Plaintiff’s Copyright Ownership Claim Accrued When Mr. Seinfeld Twice Rejected Plaintiff’s Demands For An Ownership Interest In The Show.

The district court found that “the SAC describes assertions made over three years before this lawsuit was filed that were sufficiently express as to put a reasonably diligent plaintiff on inquiry.” A-274. The district court first pointed to Mr. Seinfeld’s direct telephone conversations with Plaintiff, in which Mr. Seinfeld “twice rejected [Plaintiff’s] request for backend compensation and made it clear that [Plaintiff’s] only involvement was to be on a ‘work-for-hire’ basis.” *Id.* Specifically, Plaintiff admits that, “[u]pon hearing of [Plaintiff’s] request” for “backend compensation,” on two telephone calls, Mr. Seinfeld directly

communicated his clear and unequivocal repudiation of Plaintiff's ownership interest: that Plaintiff did not have "more than a 'work-for-hire' directing role," "should expect to be compensated through his directing fee," and would not receive "backend compensation." A-31-32 ¶¶ 70, 73. Plaintiff admits these exchanges occurred in February 2012, six years prior to filing this action, with no communications from Mr. Seinfeld regarding the Show in the interim. A-31-32 ¶¶ 69-75.

Under this Court's precedent, the termination of communications after the rejection of Plaintiff's request itself was sufficient to put Plaintiff on notice. *See Simmons v. Stanberry*, 2012 WL 1004857, at *4 (E.D.N.Y. Mar. 23, 2012) ("Plaintiff 'steadfastly asserted that he retained ownership' but ultimately, [defendant] ceased all communications with [p]laintiff. These events were sufficient to place [p]laintiff on notice that ownership was in dispute and thus, to begin accrual of his claim." (citation omitted)), *aff'd*, 810 F.3d 114 (2d Cir. 2016); *see also Kwan*, 634 F.3d at 227 (finding ownership claim accrued where defendant rejected plaintiff's authorship claim in December 1998, followed by "no communications" between parties). Mr. Seinfeld's assertion that Plaintiff had done "work-for-hire" left no doubt that ownership was in dispute.

The district court correctly applied this Court's decision in *Wilson* to hold that "Seinfeld restricting [Plaintiff] to a 'work-for-hire' directing role necessarily

contradicted any idea that [Plaintiff] was the owner of intellectual property in the show.” A-275. In *Wilson*, this Court explained that “asserting ownership *as a work for hire* would effectively repudiate [p]laintiffs’ claim . . . because, under [17 U.S.C.] § 304, in the case of works created (in the relevant time period) for an ‘employer for whom such work is made for hire,’ the employer for hire becomes effectively the author” 892 F.3d at 119; *see also Friedrich*, 716 F.3d at 318 (finding that a copyright ownership claim could accrue upon “private repudiation,” in which the defendant communicates to the plaintiff that it considers the work “to be a ‘work made for hire’”); *Brownstein v. Lindsay*, 742 F.3d 55, 71 (3d Cir. 2014) (explaining that an express repudiation would occur “if [plaintiff] *overheard a conversation* where [defendant] said that she commissioned [plaintiff] to do the work for her as a work for hire.” (emphasis added)). In *Wilson*, this Court found that the allegations in the complaint “did not call to [p]laintiff’s attention” that the sound recording at issue was “a work for hire.” 892 F.3d at 119–20. But here, Plaintiff admits in the SAC that Mr. Seinfeld directly told Plaintiff that he did not have “more than a ‘work-for-hire’ directing role.” A-31 ¶ 70; *see also* Br. 4 (“[Mr. Seinfeld] insisted [Plaintiff] had merely created a work for hire.”).

Plaintiff contends that Mr. Seinfeld’s undisputed statement that Plaintiff’s minimal contributions to the Show were “work for hire” was insufficient to place him on notice of a dispute as to ownership of the copyrights in the Show because he

believed that without a written work-for-hire agreement, Plaintiff would remain “the owner of intellectual property in the show.” Br. 32. This argument both misapprehends the facts and the law, and is beside the point. It misapprehends the facts because, after Mr. Seinfeld communicated to Plaintiff that his contributions were work-for-hire, Plaintiff’s company thereafter transmitted a written agreement in which it agreed to release all claims relating to the Show and described Plaintiff’s role as “salaried” director. A-118–19. It misapprehends the law because, in addition to written agreements, a work is work-for-hire when it is “prepared by an employee within the scope of his or her employment.” 17 U.S.C. § 101.

But whether Plaintiff’s contribution qualifies as a work-for-hire ultimately is beside the point, because Mr. Seinfeld’s assertion of work-for-hire status was sufficient to put Plaintiff on notice of the dispute as to ownership. *See Wilson*, 892 F.3d at 119. Indeed, Plaintiff admits as much when he says that Mr. Seinfeld’s assertion of work-for-hire status “implied significantly diminished compensation and credit” and a “transfer of ownership to Seinfeld.” Br. 4. As such, the district court correctly held that “[e]ven if all inferences are drawn in favor of [Plaintiff], a reasonably diligent plaintiff would have understood that Seinfeld was repudiating any claim of ownership that [Plaintiff] may have. That Seinfeld did not expressly claim ownership for himself during these conversations does not matter. It is sufficient that [Plaintiff’s] claim was rejected.” A-275.

2. Public Repudiation: The District Court Correctly Found That Plaintiff's Copyright Ownership Claim Accrued When Defendants Produced And Distributed The Show Without Crediting Plaintiff.

The district court held that Plaintiff's copyright ownership claim also accrued after "Seinfeld and the other Defendants went on to produce and distribute the show without giving any credit to [Plaintiff]." A-275. The district court correctly pointed to Plaintiff's allegation that he "believed that 'Seinfeld would eventually acknowledge [Plaintiff's] authorship and ownership and bring him in on the Project,'" *id.* (quoting A-37 ¶ 86), as an admission that "clearly alleges he was aware that the show was being produced and that he was not being credited on it." A-276. This is on all fours with *Kwan*, where this Court held that "the fact that the book in question was published without crediting [p]laintiff as an author was enough to put her on notice that her claim of authorship was repudiated." A-275 (citing *Kwan*, 634 F.3d at 227, 229).

The district court correctly found that *Kwan*'s facts "largely mirror[] the present case." A-274. In *Kwan*, the plaintiff was hired by defendants to edit a book. 634 F.3d at 226–27. In December 1998, the plaintiff wrote to defendants seeking to be credited as an author of the forthcoming book, yet defendants "rejected Kwan's express assertion of authorship." *Id.* at 229. In January 1999, the book was published without crediting plaintiff as an author. *See id.* at 227, 229. On those facts, this Court held "there is no question that Kwan was aware of the dispute

regarding her rights to [the book] by January 1999, when the first edition was published, and therefore, her ownership claim accrued at that time.” *Kwan*, 634 F.3d at 229. Here, “[a]s in *Kwan*, more than three years prior to [Plaintiff’s] filing of his suit, [Mr. Seinfeld] had made clear to [Plaintiff] that he rejected [Plaintiff’s] assertion of an interest in the copyright and had gone on to exploit the copyrighted work in a manner of which [Plaintiff] was on notice. [Plaintiff’s] assertion of his claim of a copyright interest was therefore time-barred.” *Simmons*, 810 F.3d at 116.

In addition, Plaintiff’s allegation that Defendants publicly released the Pilot episode, which is the only episode Plaintiff directed, without Plaintiff’s authorization is an admission of a distinct public repudiation of any ownership interest in the Show. *See* A-86 n.8 (noting that the Pilot was released on September 6, 2012 as the seventh episode in the Show’s first season). If the Court assumes as true Plaintiff’s assertion that he is the “sole author/owner or a joint author/owner” of the Show’s copyrights, which includes the “Pilot,” A-17 ¶ 2, there can be no clearer repudiation of Plaintiff’s copyright ownership than when “Defendants without authorization copied . . . the entire Pilot by streaming it to viewers . . . as Season One, Episode Seven of the Infringing [Show].” A-34 ¶ 82. Defendants’ public release of the Pilot “without [Plaintiff’s] authorization,” *id.*, created sufficient notice to trigger the statute of limitations. *See, e.g., Simmons*, 810 F.3d at 115 (“Despite Simmons’s evident awareness of Stanberry’s repudiation . . . and of the[] release of the allegedly

infringing song, Simmons did not file suit until more than three years after the song had been released.”); *Kwan*, 634 F.3d at 229 (“[T]here is no question that Kwan was aware of the dispute regarding her rights to [the book] by January 1999, when the first edition was published.”); *Ortiz*, 2008 WL 4449314, at *3 (“Public distribution of the work at issue . . . has been held to create sufficient notice to begin the running of the statute of limitations.”).

The district court also correctly found that Plaintiff “concedes that Seinfeld had previously claimed to be the ‘creator’ of the show in the press.” A-271 (citing A-39 ¶ 98); *see also* Br. 13 n.6. There are numerous publicly available news articles and interviews published shortly after the release of the Show’s first episode through 2014 that describe Mr. Seinfeld as the sole owner/creator of the Show. *See* A-126–33. This includes fourteen examples in which Mr. Seinfeld, in his own words, expresses in interviews that he alone created, directed, and produced the Show. For example, in an August 23, 2012 press interview—just over one month after the Show’s first episode was released—Mr. Seinfeld was asked, “So it’s entirely your own project[?]” He replied, “Yeah, this is my personal little idea of a small, fun show.” A-127. This public assertion obviously repudiates Plaintiff’s claim that *he* created the Show. *See* A-23 ¶ 28, A-38 ¶ 94.

Plaintiff now says that “because of the pain it caused him, [he] did not follow press reports about [the Show], and remained unaware” of Mr. Seinfeld’s statements.

Br. 13. One wonders, if Plaintiff was “unaware” of the statements, what exactly was causing him “pain?” In any event, whatever Plaintiff’s claimed emotional state, there is an objective “reasonably diligent plaintiff” standard for notice and “[a]n express assertion of *sole authorship or ownership* will start the copyright statute of limitations running.” *Netzer*, 963 F. Supp. at 1315 (emphasis added); *see also Weber v. Geffen Records, Inc.*, 63 F. Supp. 2d 458, 466 (S.D.N.Y. 1999) (“A reasonably diligent person would not wait six months, as plaintiff did, to take even a cursory look at the new, widely released [infringed work].”). Here, as the district court found, Plaintiff concedes that Mr. Seinfeld “had previously claimed to be the ‘creator’ of the [S]how in the press.” Br. 13 n.6 (quoting A-271). That is the definition of a “[a]n express assertion of sole authorship or ownership.” *Netzer*, 963 F. Supp. at 1315.

3. Implicit Repudiation: Plaintiff’s Copyright Ownership Claim Also Accrued When Defendants Distributed The Show Without Paying Any Royalties To Plaintiff.

Although the district court did not address it—the private and public repudiations were sufficient to resolve the motion in Defendants’ favor—Defendants’ public release of the Show without paying Plaintiff royalties constitutes yet another independent basis for accrual. The failure to compensate a purported copyright owner, such as through royalty payments, “constitute[s] clear ‘express

repudiation’ of [a plaintiff’s] alleged co-ownership of the copyright” and triggers the accrual of an ownership claim. *Mahan*, 634 F. App’x at 331. In *Mahan*, this Court ruled that defendant Roc-A-Fella Records “had long ago expressly repudiated [the] ownership claims” of “an experienced sound engineer in the recording industry,” who “had received no royalties for the sale of the Albums for fourteen years,” where “[t]he Albums . . . have sold millions of copies since being released in 1999 and 2000.” *Id.* Here, as in *Mahan*, Plaintiff admits that he is “an experienced writer/producer/director” and that he “received no royalty payments.” Br. 14, 32; *see also Santa-Rosa v. Combo Records*, 471 F.3d 224, 228 (1st Cir. 2006) (“[W]e cannot think of a more plain and express repudiation of co-ownership than the fact that Combo openly, and quite notoriously, sold Santa Rosa’s records without providing payment to him.”); *Ortiz*, 2008 WL 4449314, at *4 (“Defendants’ open distribution and exploitation of the [film] and [musical score] without paying any royalties to Ortiz should have put Ortiz on notice that [d]efendants rejected his claim to copyright in the [musical score].”); *Dewan v. Blue Man Grp. Ltd. P’ship*, 73 F. Supp. 2d 382, 387 (S.D.N.Y. 1999) (finding non-payment of royalties gave plaintiff “ample reason to know a lawsuit was necessary”).

Plaintiff claims that he did not challenge non-payment of royalties because he assumed that Mr. Seinfeld’s royalties from the Show were “modest.” Br. 34. But the law is clear that “even if the subject matter of the putative joint ownership may

ultimately prove *without value*, a party wishing to *preserve its future option to collect royalties must file suit* within the limitations period.” 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 12.05[C] (2019) (emphasis added). The question thus is whether Plaintiff “exercised reasonable diligence.” *Margo v. Weiss*, 1998 WL 2558, at *6 (S.D.N.Y. Jan. 5, 1998), *aff’d*, 213 F.3d 55 (2d Cir. 2000). Here, Plaintiff admits that after his 2012 telephone conversations with Mr. Seinfeld, he never even inquired into the possibility of receiving royalties. That defeats any claim of “reasonable diligence.”⁷

Plaintiff’s additional theory—which he impermissibly raises for the first time on appeal—that the \$107,734.41 payment made to his production company “might

⁷ Plaintiff’s citations to *Wilson* and *Friedrich*, Br. 35, are inapposite, as both cases discuss the payment of royalties in the context of copyright renewal terms, which is inapplicable here. Further, in *Wilson*, the plaintiffs’ entitlement to royalties accrued fewer than three years before they filed suit. 892 F.3d at 119. Here, assuming Plaintiff had a valid ownership claim, his entitlement to royalties would have accrued as early as 2012, when the Show was publicly released. In *Friedrich*, this Court found there was a genuine dispute as to whether the failure to pay royalties implicitly repudiated plaintiff’s ownership claim because the work was used “sparingly and in non-obvious ways” and “it was not clear that Marvel would refuse to pay royalties to Friedrich when the movie was released.” 716 F.3d at 318–19. Here, unlike in *Friedrich*, Defendants used the Show’s copyright in an “obvious” manner: the Show was publicly released, streamed millions of times, and there were multiple seasons before the statute of limitations expired. A-38 ¶¶ 93. Moreover, here, it was quite “clear” that Defendants “would refuse to pay royalties” to Plaintiff when the Show was released (*Friedrich*, 716 F.3d at 319) once Mr. Seinfeld told Plaintiff that he should only “expect to be compensated through his directing fee.” A-31–32 ¶¶ 70, 73.

have constituted a first charge against any” royalties also fails. Br. 34. First, this argument is flatly contradicted by Plaintiff’s admission in the SAC that Defendants made “no effort . . . to obtain a license . . . or to pay [Plaintiff] amounts owing to him as a joint author/owner.” A-37 ¶ 85. Moreover, the April 2012 email chain clearly shows that the \$107,734.41 payment constituted reimbursement for Plaintiff’s “salaried rate” as a director and other expenses “[i]n lieu of the backend [compensation].” A-118–19. To now contend that Defendants “might have” made an effort to pay royalties is not credible, and is nothing more than a last-ditch effort to re-write the dismissed SAC.

C. Plaintiff’s Arguments On Appeal Misstate The Record And Misapprehend The Law.

Plaintiff says that *Kwan* and *Simmons* do not control when the defendant is “neither the author nor the owner of the work in question” and are inapposite here because Mr. Seinfeld “was and is a stranger to the copyright in [the Show].” Br. 16, 18; *see also* Br. 26–27 (*Kwan* defendant “was indisputably the *author and owner*” and, as a result, “[t]he authorship and ownership associations in *Kwan* . . . bear no resemblance to those at bar, where Seinfeld is neither”). That implausible assertion is contradicted by the allegations in the SAC and fails as a matter of law.

Plaintiff’s attempt to characterize Mr. Seinfeld as a “stranger” to a Show *about and featuring Mr. Seinfeld* is patently absurd. *See, e.g.*, A-34–36 ¶¶ 81–84 (describing Mr. Seinfeld’s role in the Show). In fact, the SAC itself describes Mr.

Seinfeld as a partner in developing the Show. *See* A-28 ¶ 49 (“[T]ogether, they would release the Pilot and future *Comedians in Cars Getting Coffee* episodes”). The SAC even asserts a *joint* authorship claim. *See* A-42–44. Thus, even on Plaintiff’s distorted view, Mr. Seinfeld had an ownership interest in the Show from the outset. This is demonstrated not least by Mr. Seinfeld’s total control over the Show. As the SAC states, Mr. Seinfeld controlled, *inter alia*, the production and distribution of the Show, A-34 ¶¶ 81–82, and had the authority to determine Plaintiff’s involvement in the Show, A-37 ¶ 86. The April 2012 email chain makes clear that it was Mr. Seinfeld who hired Plaintiff to direct the Pilot, A-119 (“Jerry called [Plaintiff] in September to work on the [Show] concept.”). Plaintiff’s proposed distinction is contradicted by his own allegations in the SAC.

Plaintiff’s contention that the rule of *Kwan* and *Simmons* is inapplicable when the plaintiff alleges that the defendant has no interest in the copyright is also incorrect on the law and not sensible as a policy matter. First, in both *Kwan* and *Simmons*, the plaintiffs each denied that the defendants had interests in the copyrights at issue, just as Plaintiff does here. In *Kwan*, the plaintiff “corrected” her copyright registration for the disputed work “to identify herself as the sole author.” *Kwan*, 634 F.3d at 227; *see also Kwan v. Schlein*, 2009 WL 10678967, at *1 (S.D.N.Y. Apr. 23, 2009) (“Ms. Kwan counters that she is claiming sole authorship of portions of the . . . text.”), *subsequently aff’d*, 634 F.3d 224 (2d Cir. 2011). And

in *Simmons*, the plaintiff claimed to be an exclusive licensee, and thus the holder of “the right to bar all others” from using the work at issue. 810 F.3d at 115. The facts of *Kwan* and *Simmons* do not support Plaintiffs’ proposed distinction between cases in which the plaintiff concedes the defendant has an ownership interest in the copyrights, and cases in which the plaintiff does not. And, not surprisingly given the facts of each case, Plaintiff points to no language in either *Kwan* or *Simmons* that even remotely suggests that the application of the *Kwan* rule turns on whether the plaintiff acknowledges the defendant’s role in the creation of a work.⁸

Second, Plaintiff’s proposed distinction divorces the *Kwan* and *Simmons* rule from their policy rationale, which is to compel early litigation of ownership *disputes*. And “Defendants [are] not required to claim ownership themselves to successfully repudiate Plaintiff’s ownership.” *Walker v. Carter*, 2017 WL 3641707, at *2 (S.D.N.Y. July 12, 2017), *aff’d sub nom. Walker v. Burke*, 739 F. App’x 72 (2d Cir. 2018) (summary order). Plaintiffs in ownership disputes routinely claim that the defendant has no interest in the copyright at issue. *See, e.g., Walker v. Carter*, 210 F. Supp. 3d 487, 505 (S.D.N.Y. 2016) (finding defendants repudiated plaintiff’s

⁸ Plaintiff attempts to distinguish *Simmons* on the ground that the plaintiff there was an exclusive licensee rather than an owner of the copyright as in *Kwan*. Br. 27. But this Court rejected that very distinction in *Simmons*, finding it to be “not material for these purposes.” 810 F.3d at 116; *see also id.* (“We can see no reason why the statute of limitations should apply differently in *Simmons*’s case than in *Kwan*’s.”).

ownership claim even though plaintiff asserted “that none of the defendants own any copyright rights”), *aff’d sub nom. Walker v. Burke*, 739 F. App’x 72 (2d Cir. 2018). The policy rationale of promoting early resolution of ownership disputes applies with equal force in such cases. If there is a dispute, it must be litigated within three years, even if the plaintiff thinks it is one-sided.

Plaintiff argues that the issue before the district court “*should* have been whether anything qualified *Seinfeld* as either an author or an owner.” Br. 15. But that is a *merits* inquiry.⁹ Statutes of limitations run from the accrual of a *claim*, and, as this Court has explained time and again, that occurs “when a reasonably diligent plaintiff knows or has reason to know of the injury upon which the claim is premised.” *Mahan*, 634 F. App’x at 331 (citing *Kwan*, 634 F.3d at 228; *Merch.*, 92 F.3d at 56). Here, the district court correctly concluded that Defendants had repudiated Plaintiff’s claim of ownership in 2012, in multiple ways. Plaintiff cannot defeat application of the *Kwan* rule now by spuriously claiming that Mr. Seinfeld is a “stranger” to the copyrights in the Show. If a plaintiff could evade the *Kwan* rule merely by asserting that a defendant has no ownership interests in the copyright at

⁹ Plaintiff claims that the district court somehow “implicitly found” that Mr. Seinfeld “owns the copyright” in the Show. Br. 14. That is incorrect. As demonstrated above, the district court correctly found that Defendants had repudiated Plaintiff’s claim of ownership. That is sufficient to accrue a claim for ownership, but, of course, does not itself resolve the merits of such a claim.

issue, then it would rarely, if ever, apply, and the sound copyright policy of promoting early resolution of ownership disputes would be frustrated.¹⁰

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court affirm the district court's judgment granting Defendants' motion to dismiss the SAC.

Dated: January 17, 2020

Respectfully Submitted,

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¹⁰ Pointing to Defendants' copyright registration for the Show, Plaintiff also argues that "nothing in the record below establishes that [Plaintiff] was 'put on notice' of defendants [sic] first copyright registration for [the Show], which in any event was issued on September 8, 2016 – well within the statute of limitations." Br. 29–30. Defendants, however, have never relied on their copyright registration for the Show as the operative trigger for the accrual of the statute of limitations in this case. In their arguments to the district court, Defendants made clear that "although Defendants' copyright registration for the Show *pre-dated* the ones filed by Plaintiff, Defendants rely on numerous other admissions in the SAC that give rise to express repudiation." A-258 n.3; *see Simmons*, 2012 WL 1004857, at *2–4 (finding ownership claim accrued prior to defendant's copyright registration of the work); *Mahan*, 2015 WL 1782095, at *4 (discussing "alternative forms of 'express repudiation'"). Here, Defendants identify several admissions in the SAC that give rise to express repudiation. *See supra* Section I.B.

**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
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1. This brief complies with the type-volume requirement of Local Rule 32.1(a)(4)(A) because this brief contains 8,034 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

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Dated: January 17, 2020

/s/ Orin Snyder
Orin Snyder

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of January 2020, a true and correct copy of the foregoing Defendants-Appellees Brief was served on the following counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) & (2).

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