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

AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND and BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND 14 Penn Plaza, Twelfth Floor New York, New York 10122 Plaintiffs, v. ATLANTIC RECORDING CORPORATION 3400 W. Olive Ave. Burbank, CA 91505, HOLLYWOOD RECORDS 500 South Buena Vista St. Burbank, CA 91521, SONY MUSIC ENTERTAINMENT 550 Madison Ave. New York, NY 10022, UNIVERSAL MUSIC GROUP RECORDINGS, INC. 6301 Owensmouth Ave. Woodland Hills, CA 91367, and WARNER BROTHERS RECORDS, INC., 3400 W. Olive Ave. Burbank, CA 91505 Defendants.	Civil Action No.

COMPLAINT

Introduction

1. This is an action to collect delinquent contributions that the Defendants owe to the Plaintiff American Federation of Musicians and Employers' Pension Fund ("Pension Fund") under the terms of a collectively bargained agreement between the Defendants and the American Federation of Musicians of the United States and Canada, AFL-CIO ("AFM"). This action is brought pursuant to § 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), to enforce § 515 of ERISA, 29 U.S.C. § 1145; and pursuant to § 301(a) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a).

Jurisdiction and Venue

2. The Court has jurisdiction of this action under 29 U.S.C. § 1132(a)(3), 29 U.S.C. § 185(a), and 28 U.S.C. § 1331.

3. Venue is proper in this district pursuant to 29 U.S.C. § 1132(e)(2) because the Pension Fund is administered in this district, and under 29 U.S.C. § 185(a) because the Court has jurisdiction over all parties.

Parties

4. Plaintiff Pension Fund is a trust fund established and maintained pursuant to § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5). Plaintiff Pension Fund is an employee benefit plan within the meaning of §§ 3(2) and 3(3) of ERISA, 29 U.S.C. §§ 1002(2) and (3), and is maintained for the purpose of providing retirement and related benefits to eligible participants and their beneficiaries. Plaintiff Pension Fund also is a multiemployer pension plan within the meaning of § 3(37) of ERISA, 29 U.S.C. § 1002(37).

5. Plaintiff members of the Board of Trustees of the Pension Fund (hereinafter, "Trustees") are fiduciaries within the meaning of § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

6. All Plaintiffs maintain their principal place of business at 14 Penn Plaza, Twelfth Floor, New York, New York 10122, from where the Pension Fund is administered.

7. Plaintiffs bring this action on behalf of themselves and on behalf of Pension Fund participants and beneficiaries pursuant to §§ 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), to enforce § 515 of ERISA, 29 U.S.C. § 1145; and pursuant to § 301(a) of the LMRA, 29 U.S.C. § 185(a).

8. Each Defendant — Atlantic Recording Corporation ("Atlantic"), Hollywood Records ("Hollywood"), Sony Music Entertainment ("Sony"), Universal Music Group Recordings, Inc. ("UMG"), and Warner Brothers Records, Inc. ("Warner") — is an employer in an industry affecting commerce within the meaning of Sections 3(5), 3(11), and 3(12) of ERISA, 29 U.S.C. §§ 1002(5), (11) and (12), and Sections 2(2), (6) and (7) of the LMRA, 29 U.S.C. §§ 152(2), (6) and (7).

9. Each Defendant is an incorporated entity doing business under its own name and through subsidiaries and affiliates throughout the United States and abroad, including within this judicial district.

Statement of Claim

Background Facts

10. For many years, including at all relevant times herein, the major record companies in this country, including each Defendant, and the AFM—a labor union that represents musicians who are employed in the recording of phonographic records—have been parties to a series of

collectively bargained agreements styled as "Sound Recording Labor Agreements," or "SRLAs" for short.

11. The SRLAs require, *inter alia*, that the signatory record companies share with musicians represented by the AFM some designated portion of certain revenues earned from various exploitations of sound recordings made by those musicians, including the direct sale of such sound recordings by the record companies and the record companies' licensing to third parties of their rights in such sound recordings.

12. From the inception of the SRLA to the early 2000s, the primary form of exploitation of sound recordings was distribution via physical product sales (*e.g.*, vinyl records, cassette tapes, compact discs), and the formulas and distribution mechanisms within the SRLA at such times detailed the record companies' obligations to share revenues with musicians specifically with respect to physical products.

13. The advent of the digital age, however, gradually led to the creation of new digital forms of exploitation of sound recordings, including permanent audio downloads (*e.g.*, iTunes) and non-permanent audio downloads and audio streams (*e.g.*, Rhapsody and other subscription services). This development required AFM to negotiate new agreements with the record companies to ensure that its member-musicians shared in a portion of the revenues the record companies earned from the digital exploitation of sound recordings.

14. Even though the full potential of such digital exploitations was yet to be realized at the time and neither AFM nor the major record companies had a firm understanding of what such digital technologies would entail, the AFM and the companies reached an agreement in 1994 regarding the companies' obligation to share revenues from certain digital exploitations with performers, commonly referred to as the 1994 Memorandum of Agreement, or "1994

MOA" for short. In the 1994 MOA, the parties pledged their joint best efforts to support legislation amending the Copyright Act of 1976 ("Copyright Act") in certain specific respects mutually desired by the parties. The parties' joint efforts in support of that legislation were successful, and the Copyright Act was in fact amended in 1995 in the manner mutually desired by the parties.

15. Under the 1995 amendments of the Copyright Act, the record companies (which typically own the copyrights in sound recordings produced under the SRLA) have the exclusive right to perform, or to authorize third parties to perform, those sound recordings by means of a digital transmission, limited by a statutory license (sometimes referred to as a "compulsory" license) for certain types of digital performances. The statutory license permits third parties to publicly perform sound recordings by digital transmission upon meeting the license conditions and paying the established license fees to be divided between the copyright owners and performers, including musicians and vocalists, who performed on the sound recordings.

16. For digital transmissions that are not subject to the statutory license, the 1995 amendments provide that a record company that owns the sound recording copyright has the exclusive right to permit or deny third parties the right to publicly perform the sound recording, and a third party desiring to use a sound recording in this way must negotiate a license with the record company. In anticipation of the 1995 amendments of the Copyright Act, the parties to the 1994 MOA explicitly agreed that the signatory record companies would pay (for further distribution to musicians) 0.5% of all receipts (as defined in the Act's legislative history) collected by the record companies "as a result of the amendment of the Copyright Act of 1976 to provide copyright owners with the exclusive right, not limited by statutory or compulsory licensing, to publicly perform sound recordings by means of a digital transmission."

17. The record companies' contractual obligation under the 1994 MOA to share with musicians 0.5% of all receipts collected by them "as a result of" the above-described 1995 amendment of the Copyright Act encompassed an obligation to share with musicians 0.5% of all licensing revenues generated by the record companies under non-statutory licenses authorizing third parties to publicly perform copyrighted sound recordings via digital transmissions in the United States. That is so because the above-described 1995 amendment of the Copyright Act, by its terms, gave the record companies an enforceable legal right to compel third parties to obtain such non-statutory licenses as a condition of publicly performing sound recordings via digital transmissions in the United States outside of the statutory license, and to pay the record companies the licensing fees negotiated in those non-statutory licenses.

18. The record companies' contractual obligation under the 1994 MOA to share with musicians 0.5% of all receipts collected by them "as a result of" the above-described 1995 amendment of the Copyright Act also encompassed an obligation to share with musicians 0.5% of all licensing revenues generated by the record companies under licenses authorizing third parties to publicly perform copyrighted sound recordings via digital transmissions abroad. That is so because the above-described amendment of the Copyright Act enabled the companies to obtain an enforceable legal right abroad, pursuant to the WIPO Performances and Phonograms Treaty (or "WPPT"), to compel third parties to obtain such licenses as a condition of publicly performing sound recordings via digital transmissions abroad, and to pay the record companies the licensing fees negotiated in those licenses. That is also so because the above-described amendment of the Copyright Act was essential to the ultimate development of an audio streaming marketplace in which the record companies were able to generate licensing revenue

from both domestic and foreign streaming that they would not have been able to generate but for that amendment.

19. The 1994 MOA provided for a 10-year term beginning on the effective date of the 1995 amendments of the Copyright Act (February 1, 2006).

20. In late 2005, shortly before the 1994 MOA was set to expire, the AFM and the record companies entered into negotiations over a successor SRLA covering the period from February 1, 2006 to January 31, 2009. In January 2006, the record companies proposed for incorporation into the SRLA a "Digital Exploitation Agreement" ("January 2006 Record Company Proposal") to, among other things, replace the 1994 MOA.

21. In their January 2006 Record Company Proposal, the record companies denominated digital transmissions for which payments for the benefit of musicians had been required under the 1994 MOA as "Audio Streams," which they defined as "digital transmissions of Sound Recordings in the U.S. *and abroad*, in a manner that is not intended to provide a tangible copy of the exploited work to the consumer" (emphasis added). That record company proposal evinces a clear understanding on the companies' part that their contractual payment obligation under the 1994 MOA with respect to audio streams extended to *both* audio streaming in the United States (*i.e.*, domestic audio streams) *and* audio streaming abroad (*i.e.*, foreign audio streams), as set out in paragraphs 17-18 above.

22. The January 2006 Record Company Proposal proposed to continue the 0.5% payment rate contained in the 1994 MOA, but proposed significant alterations to other payment terms (including the application of the payment rate to "Wholesale Price" rather than to "receipts" and a limitation of the payment obligation on each sound recording to a period of ten years from its release).

23. The January 2006 Record Company Proposal did not become the final agreement between the parties (in part because the AFM refused to agree to the proposed changes in the payment terms). Instead, the parties reached an agreement in late 2006 memorialized by a Memorandum of Understanding that included, as Appendix A, a "Digital Exploitation Term Sheet." The Digital Exploitation Term Sheet retained from the January 2006 Record Company Proposal the definition of an "Audio Stream" as a "digital transmission in the U.S. *and abroad*," (emphasis added), but provided that payments attributable to non-statutory licenses for Audio Streams would be made on the same terms already provided for under the 1994 MOA (including the payment rate of 0.5%, the application of the rate to "receipts," and no ten-year time limitation from the date of release of a recording).

24. The Digital Exploitation Term Sheet also clarified a question that had arisen among the parties as to whether a non-permanent download of a sound recording should be covered under the SRLA by terms similar to those covering the sale of permanent downloads of sound recordings, or whether instead it should be covered by the 1994 MOA as a stream. The Digital Exploitation Term Sheet resolved that question by treating it as neither: instead, it created a free-standing (*i.e.*, not tied to the 1994 MOA) SRLA payment obligation on the part of the Defendant record companies with respect to non-permanent audio downloads, consisting of an obligation to pay 0.55% of the wholesale price on non-permanent audio downloads produced on or after February 1, 2006. For this purpose, and in a manner fully consistent with the 1994 MOA's and the Digital Exploitation Term Sheet's treatment of audio streams, the contracting parties defined the term "Non-Permanent Audio Download" as a sound recording "sold via digital transmission in the U.S. *and abroad* on a temporary, tethered, conditional, or 'timed out' basis" (emphasis added).

25. The Digital Exploitation Term Sheet did not resolve a similar question as to whether ringbacks should be covered under the SRLA, like a permanent download, or under the 1994 MOA, like a stream: it simply provided that ringbacks would be covered by, and payments made pursuant to, either the SRLA or the 1994 MOA. (The parties subsequently agreed in an agreement known as the 2012 Payment Obligation Agreement that ringbacks were to be paid in accordance with the 1994 MOA.) In either case, for the reasons set out in the preceding paragraphs, payments on *both* domestic *and* foreign ringbacks are required.

26. The foregoing contractual payment obligations imposed on the Defendant record companies by the Digital Exploitation Term Sheet of the 2006 SRLA have been continued in full force and effect without interruption from the expiration of the 2006 SRLA on January 31, 2009 through the present time pursuant to multiple extension agreements entered into by the parties to the SRLA.

27. In late 2012, the AFM and the Defendant record companies entered into a collectively bargained agreement (the "2012 Payment Obligation Agreement") providing that all contractually required record company payments on (a) audio streams, (b) non-permanent audio downloads and (c) ringbacks, then due and owing and thereafter due and owing under the terms of the parties' Digital Exploitation Term Sheet, would be made to the Plaintiff Pension Fund. The 2012 Payment Obligation Agreement is thus a collectively bargained agreement under which the Defendant record companies are obligated to make contributions to the Pension Fund, a multiemployer pension plan, within the meaning of section 515 of ERISA, 29 U.S.C. § 1145. The 2012 Payment Obligation Agreement is also a contract between employers and a labor organization within the meaning of section 301 of the LMRA, 29 U.S.C. § 185.

28. Non-defendant Capitol Records, LLC was a party to both the 2012 Payment Obligation Agreement and the Digital Exploitation Term Sheet, but by virtue of Defendant UMG's purchase of Capitol Records, the contractual payment obligations of Capitol Records under those agreements are now the contractual payment obligations of Defendant UMG.

COUNT I – BREACH OF CONTRACTUAL OBLIGATION TO MAKE PAYMENTS TO THE PENSION FUND ON REVENUES DERIVED FROM FOREIGN AUDIO STREAMS
(Against All Defendants Under ERISA § 515 and LMRA § 301)

29. Plaintiffs reallege and restate each of the allegations set forth in Paragraphs 1–28.

30. On or around January 30, 2014, the Pension Fund, through independent auditors, initiated an audit of each Defendant recording company to determine if each company was in compliance with its contractual payment obligations to the Pension Fund under the 2012 Payment Obligation Agreement.

31. Although these audits have not yet been completed, it appears that each Defendant record company has not reported on and paid to the Fund contractually required contributions based on revenues derived by the record companies from foreign audio streams.

32. The Pension Fund has demanded that each Defendant record company report on and pay these contractually required contributions to the Fund. Each of the Defendant record companies has wrongly refused to report or make payments to the Fund with respect to its revenues from foreign audio streams.

33. The refusal of each Defendant record company to report on and pay such contractually required contributions to the Pension Fund is a breach of each company's contractual payment obligations to the Fund under the 2012 Payment Obligation Agreement that is actionable and remediable under both § 515 of ERISA, 29 U.S.C. § 1145, and § 301 of the LMRA, 29 U.S.C. § 185.

COUNT II – BREACH OF CONTRACTUAL OBLIGATION TO MAKE PAYMENTS TO THE PENSION FUND ON REVENUES DERIVED FROM FOREIGN NON-PERMANENT AUDIO DOWNLOADS
(Against Defendants Atlantic, Hollywood, UMG, & Warner Under ERISA § 515 and LMRA § 301)

34. Plaintiffs reallege and restate each of the allegations set forth in Paragraphs 1–28.

35. In the communications between the Pension Fund and the Defendant record companies on the issue of foreign audio streams, the Defendant record companies have stated that, "[a]s a general matter," they "do not dispute" that payments on foreign non-permanent audio downloads "are required." However, based on the Pension Fund's audits to date, it appears that the only Defendant record company that has made such payments to the Fund on foreign non-permanent audio downloads is Sony.

36. The apparent failure by the remaining Defendants (*i.e*, Atlantic, Hollywood, UMG, and Warner to report on and make such payments to the Fund on foreign non-permanent audio downloads as specified by contract is a breach of each company's contractual payment obligations to the Fund under the 2012 Payment Obligation Agreement that is actionable and remediable under both § 515 of ERISA, 29 U.S.C. § 1145, and § 301 of the LMRA, 29 U.S.C. § 185.

COUNT III – BREACH OF CONTRACTUAL OBLIGATION TO MAKE PAYMENTS TO THE PENSION FUND ON ALL REVENUES DERIVED FROM RINGBACKS
(Against All Defendants Under ERISA § 515 and LMRA § 301)

37. Plaintiffs reallege and restate each of the allegations set forth in Paragraphs 1–28.

38. To this point in its audit of each Defendant record company, the Pension Fund has been unable to determine whether the companies have reported on and paid to the Fund contractually required contributions based on all revenues, foreign and domestic, derived by the companies from ringbacks. From all appearances, however, none of the Defendant record companies has done so.

39. The Pension Fund has raised this issue with each Defendant record company and demanded that, to the extent it has not done so already, each company report on and pay all such contractually required contributions to the Fund. The Defendant companies, in response, have acknowledged a contractual obligation to make payments based on domestic ringbacks, but have denied any contractual obligation to make payments on foreign ringbacks.

40. The apparent failure by each Defendant record company to report on and pay to the Fund contractually required contributions based on all revenues, foreign and domestic, derived by the company from ringbacks, is a breach of the company's contractual payment obligations to the Fund under the 2012 Payment Obligation Agreement that is actionable and remediable under both § 515 of ERISA, 29 U.S.C. § 1145, and § 301 of the LMRA, 29 U.S.C. § 185.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

a. Enter a judgment declaring that Defendant record companies have a contractual obligation to make payments to the Plaintiff Pension Fund on all (a) revenues derived by the record companies from foreign audio streams; (b) revenues derived by the record companies from foreign non-permanent audio downloads; and (c) revenues, foreign and domestic, derived by the record companies from ringbacks.

b. Enter an injunction requiring that each of the Defendant record companies that has failed to do so promptly submit reports to the Pension Fund identifying by category the audio stream, non-permanent audio download and ringback revenues on which it has not previously made contributions to the Fund in accordance with its contractual obligations as declared by the Court, such identification to be made with sufficient detail and precision to enable the Fund to

calculate the delinquent contribution amounts due and owing to the Fund from each Defendant record company based on those revenues.

c. Enter a separate monetary judgment against each Defendant record company for the full amount of the delinquent contributions that the reports submitted by each company show are due and owing to the Fund, together with interest on those delinquent contributions and liquidated damages in an amount equal to 20% of each Defendant's delinquent contributions as provided for under the Trust Agreement and ERISA § 502(g)(2)(C)(ii), 29 U.S.C. § 1132(g)(2)(C)(ii).

d. Award Plaintiffs their reasonable attorneys' fees and costs incurred in bringing and prosecuting this litigation.

e. Order such other legal and equitable relief as the Court deems appropriate.

DATED: August 10, 2015

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.

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