UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 14-CV-23057-JLK

JAMES "JAS" PRINCE and
YOUNG EMPIRE MUSIC GROUP, LLC

Plaintiffs,

v.

CASH MONEY RECORDS, INC.

Defendant.

_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs, James "Jas" Prince ("Prince") and Young Empire Music Group, LLC ("YEMG") (collectively, "Plaintiffs"), by and through their undersigned counsel and pursuant to Fed. R. Civ. P. 12(b)(6), hereby file this Response in Opposition to Defendant's Motion to Dismiss or, in the Alternative, to Stay [D.E. 7]("Motion to Dismiss") and states:

INTRODUCTION

Aubrey Graham (p/k/a "Drake") is one of the most popular hip-hop/rap artists in the country. Plaintiffs discovered Drake, and introduced Drake to Aspire Music Group, LLC ("Aspire"). With the help and assistance of Plaintiffs, Drake signed an exclusive recording artist agreement with Aspire. Plaintiffs then introduced Drake to defendant, Cash Money Records, Inc. ("CMR"). With the help and assistance of Plaintiffs, CMR agreed to record and distribute Drake's music. Accordingly, Aspire entered into a Memorandum of Agreement (the "MOA") with CMR (and Young Money Entertainment, LLC) pursuant to which Aspire furnished the

exclusive recording services of Drake to CMR. The MOA was intended to be an interim agreement pending entry into a more formal agreement[1].

It was always intended that the Plaintiffs would receive a portion of the revenue from the relationship memorialized by the MOA. Recognizing this, 13 days after it entered into the MOA and before a single penny was paid pursuant to the MOA, Aspire and Plaintiffs entered into a settlement agreement and general release (the "Settlement Agreement") in which Aspire acknowledged that two-thirds (2/3) of the monies it was to receive pursuant to the MOA would be paid to Plaintiffs. CMR was directed to make such payments directly to Plaintiffs. Consistent with the participant's understanding and agreements, CMR has acknowledged its obligations to Plaintiffs, has made 2 payments in partial satisfaction of the amount due to Plaintiffs, (each in the amount of $1,000.000.00) and has communicated directly with Plaintiffs about these obligations.

On November 8, 2013, Defendant sent a letter (the "Wire Letter") to Plaintiffs again acknowledging its written and oral agreement and creating a direct obligation to pay to Plaintiffs twenty-two percent (22%) share of profit advances, net profits and other advances under the Settlement Agreement, and acknowledging its oral agreement with Plaintiffs; agreeing to same and agreeing to account to Plaintiffs in making such payments (the "Oral Agreement").

However, to date, CMR has refused to provide an accounting to Plaintiffs along with the underling and source documents necessary for Plaintiffs to determine the correct amount they are owed from the sale of Drake's recordings (which demonstrated gross receipts in the amount of

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[1] The initial paragraph of the MOA states:

> This Agreement sets forth the basis understanding between Artist, Aspire and Company with respect to Aspire furnishing the services of Artist as an exclusive recording artist to Company. The parties agree to enter into a more formal agreement which shall be negotiated in good faith, but until such time, this Agreement shall be a full and binding agreement.

Plaintiffs are not aware of the existence of the "more formal agreement."

eighty-four million dollars ($84,000,000.00) as of July of 2013). This lawsuit is Plaintiffs' effort to determine what they are owed, and to obtain payment of that amount. CMR has generated more than $40,000.000.00 in revenues from its relationship with Drake, which would never have occurred but for the efforts of Plaintiffs. CMR has acknowledged its' agreement to compensate Plaintiffs' efforts, but in its motion, has asked this Court to overlook the written contracts, oral agreement and past performance acknowledging same.

ARGUMENT

I. Standards For Dismissal.

"When considering a motion to dismiss, all facts set forth in the plaintiff's complaint 'are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto.'" *Grossman v Nationsbank, N.A.*, 225 F.3d 1228, 1231 (1th Cir. 2000). "[T]he court must accept the allegations of the complaint as true" and "the complaint must be viewed in the light most favorable to the plaintiff." *Caravello v American Airlines, Inc.,* 315 F.Supp. 2d 1346, 1348 (S.D. Fla. 2004)(citing *United States v Pemco Aeroplex, Inc.,* 195 F.3d 1234, 1236 (11th Cir. 1999)(en banc) and *St. Joseph's Hospital, Inc. v Hospital Corp. of America,* 795 F.2d 948, 953 (11th Cir. 1986)). "To survive a motion to dismiss, the complaint must contain factual allegations which are 'enough to raise a right to relief above the speculative level." *Denarii Systems, LLC v Arab,* 2012 WL 500826 *4(S.D. Fla. Feb. 11, 2013)(citing *Bell Atlantic Corp. v Twombly,* 550 U.S. 544, 555 (2007)). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v Iqbal,* 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed. 2d 868 (2009). "The issue to be decided is not whether the claimant will ultimately prevail, but 'whether

the claimant is entitled to offer evidence to support the claims.'" *Denarii,* 2012 WL 500826 *4 (citing *Scheuer v Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974)."

II. Plaintiffs Can Correct Any Purported Defect in Assertions Regarding Diversity Jurisdiction.

"Unless a motion to amend a pleading is made in bad faith or for undue delay, constitutes dilatory conduct or will prejudice a non-movant, leave to amend should be given freely." *Denarii,* 2012 WL 500826 *6 (citing *Hargett v Valley Fed. Sav. Bank,* 60 F.3d 754, 761 (11th Cir. 1995). Any defect in the pleading may be easily cured by amendment, since diversity jurisdiction exists. Plaintiff since Prince is a citizen of Texas, the members of YEMG are citizens of Texas, and Defendant CMR is a Louisiana corporation with its principle place of business in Miami, Florida. 28 USC § 1332(a).

First, Defendant asserts that Plaintiffs do not properly allege Prince's citizenship. "State citizenship, or "domicile" for purposes of diversity jurisdiction is determined by two factors: residence and intent to remain." *Jones v. Law Firm of Hill & Ponton,* 141 F. Supp. 2d 1349 (M.D. Fla. 2001). *See also Scoggins v. Pollock*, 727 F.2d 1025, 1026 (11th Cir. 1984); *Las Vistas Villas, S.A. v. Petersen*, 778 F. Supp. 1202 (M.D. Fla. 1991). In determining domicile, a court should consider presumptions with one such presumption being that the state in which a person resides is also that person's domicile. *Id. See also Mitchell v. United States*, 88 U.S. (21 Wall.) 350, 352, 22 L. Ed. 584 (1874); *District of Columbia v. Murphy*, 314 U.S. 441, 455, 86 L. Ed. 329, 62 S. Ct. 303 (1941). Here, Plaintiffs clearly stated that Prince is a resident of Texas, and that he is the principal of a business in Texas. *See* Complaint at ¶ 3. For an individual who resides in Texas and runs a business in Texas, the clear presumption that should be afforded by the Court is that he is a citizen of Texas, and Defendant has offered no evidence to combat any such presumption.

Second, Defendant asserts that Plaintiffs fail to state YEMG's citizenship which is a Texas LLC see Complaint ¶ 1. In it's Motion, Defendant cites to the Eleventh Circuit case, *Taylor v. Appleton*, 30 F. 3d 1365 (11th Cir. 1994); However, *Taylor* clearly states that "for a corporate defendant the complaint must allege either the corporation's state of incorporation or principal place of business." *Id.* Plaintiff's Complaint explicitly states that YEMG's principle place of business is Houston, Texas. *See* Complaint at ¶ 4.

III. Aspire is Not an Indispensable Party.

Defendant asserts facts outside of the complaint claiming that Aspire is an indispensable party, and as such, Plaintiffs' Complaint should be dismissed or stayed because the claims cannot be adjudicated without Aspire's participation. Motion to Dismiss at pp. 4-5. CMR claims that Aspire's joinder is necessary because "complete relief cannot be afforded to Plaintiffs *without impacting Aspire's rights*." Motion to Dismiss at p. 5 (emphasis added)[2]. This is an insufficient basis to mandate Aspire's joinder which at most, is an Affirmative Defense. A party is indispensable if it is subject to service of process, its joinder will not deprive the court of subject matter jurisdiction and "in that person's absence, the court cannot accord complete relief among existing parties…." Fed. R.Civ. P. 9(1)(A)(emphasis added). CMR misconstrues this rule in focusing on the impact on Aspire, which is irrelevant to this determination. "A Rule 19(a)(1) inquiry is limited to whether the district court can grant complete relief to the persons already parties to the action. The effect a decision may have on an absent party is not material." *Janney Montgomery Scott v Shepard Niles,* 11 F.3d 399, 405 (3rd Cir. 1993).

[2] Not only does this fail to provide a basis for Aspire's compulsory joinder, but CMR offers no proof to support this contention. All CMR offers is its bald assertion that "Aspire would be affected by the outcome. Indeed, an outcome in this action would affect Aspire both in terms of the monies that might be paid as a damages remedy (or subject to a constructive trust as Plaintiffs also request) and in terms of financial information that might be provided in an accounting remedy." Motion to Dismiss at pp. 4-5. How paying Plaintiffs what they are owed and providing them with the backup to ensure that they are paid the correct amount would impact Aspire (who is free to seek the amount it is owed) is left to conjecture.

Plaintiffs simply seek a judgment against CMR for its breach of the direct obligations owed to them; regardless of what CMR might otherwise owe Aspire. If Plaintiffs are correct, they will obtain a judgment against CMR for what they are owed; if not, CMR will prevail. "[C]omplete relief can be accorded between the present parties. Only [CMR] is alleged to be in breach of the contract and only [CMR] would be liable if a judgment is awarded to [plaintiffs]." *Wheaton v Diversified Energy, LLC,* 215 F.R.D. 487, 489-491 (E.D. Pa. 2003). Heidi Wheaton was the sole shareholder of J.F. Energy. *Id.* at 489. Wheaton sold this stock to Diversified pursuant to an agreement among Wheaton, Diversified and J.F. Energy. *Id.* Wheaton sued Diversified for breach of this agreement claiming Diversified had not paid her all she was entitled to. *Id.* "J.F. Energy is not liable to Wheaton for Diversified's alleged breach. Only Diversified would owe Wheaton monies if Wheaton were to be successful in this case."[3] *Id.* at 491. This is the same scenario here. Defendant is obligated to pay and account directly to Plaintiffs under the terms of the Oral Agreement between Plaintiffs and CMR. CMR's acknowledgment of this obligation is best exhibited by its two payments paid directly to Plaintiffs, each of one-million dollars ($1,000,000.00). The failure of the temporary MOA to accurately incorporate the terms of this Oral Agreement and to differentiate what portion of the revenue was to go to Plaintiffs and what portion was to go to Aspire, brought about the Settlement Agreement and the undisputed direction to CMR to pay directly to Plaintiffs their share of the revenue. Most telling Aspire was not a party to the Oral Agreement between Plaintiffs and CMR. Just because Aspire is a party to another agreement with CMR and may also be owed money by CMR does not make it an indispensable party. This would be true even if Plaintiffs' and Aspire's agreements with CMR are one and the same. "There is no hard and fast

[3] Although this observation was made in the Court's analysis of Rule 19(1)(B)(ii), it is applicable to Rule 19(1)(A) too.

rule that requires all parties to a contract to be joined as parties in a breach of contract suit that is before a federal court sitting in diversity." *Wheaton,* 215 F.R.D. at 489-491. Plaintiffs' claims will succeed or fail with the existing parties. Moreover, Defendant goes so far as attaching additional "evidence" to Defendant's Motion that was neither attached to the Complaint nor referenced in the Complaint (the "Letter of Direction" or the "Letter") and the Plaintiff's lawsuit in New York against Aspire, the Letter and the New York lawsuit is well outside the four corners of the Complaint and it is improper for the Court to consider same on this motion to dismiss. "A motion to dismiss a complaint is not a motion for summary judgment in which the court may rely on fact adduced in deposition, affidavits, or other proofs." *Mancher v. Seminole Tribe of Fla., Inc.*, 708 So 2d 327 (Fla. 4th DCA 1998). Because factual conflicts cannot be resolved on a motion to dismiss, the Letter of Direction and the allegations about Plaintiff's lawsuit in New York should not be considered for purposes of the instant Motion.

Moreover, CMR's citation to *Torcise v Community Bank of Homestead (In re: Torcise),* 116 F.3d 860, 865 (11th Cir. 1997), for the proposition that "all claimants to a fund must be joined to determine the disposition of that fund" (Motion to Dismiss at p. 5) does not help its cause. As CMR concedes in addressing Plaintiffs' conversion claim, this is not a matter of a specific fund. (Motion to Dismiss at p. 10) ("there is no allegation that a specific transaction resulted in specifically identifiable monies…."). In *Torcise,* to the contrary, competing parties both with security interests had competing claims to specifically identified revenues that were deposited into a specifically identified and isolated lock box. *Torcise,* 116 F.3d at 862-864. Further, joinder was sought in *Torcise* under Rule 19(a)(2)(ii) because it would subject a party to substantial risk of incurring double, multiple, or otherwise inconsistent obligations. *Id.* at 865-866. This is not why joinder is sought here. Finally, compulsory joinder was not imposed in

Torcise even though the purported indispensable party had a competing claim to the fund. *Id.* at 867. Finally, the terms of the Settlement Agreement make it clear that monies owed by CMR to Aspire and Plaintiff, is not part of a common fund, because the claim and unambiguous provision segregates Plaintiff's 2/3 portion and creates a direct payment obligation of Plaintiff's portion (which is the subject of this case).

Since Aspire has no intent in the monies owed by CMR to Plaintiff, it is not an indispensable party and no basis exists to stay this action. Whether or not Aspire has liability to Plaintiffs and in what amount will be determined in the Plaintiffs action against Aspire pending in New York. This alone serves no basis to stay this action. CMR's failure to cite to any authority where a stay was issued under these circumstances is illustrative. Furthermore, CMR ignores Plaintiffs' remaining non-contractual claims, which clearly can proceed without Aspire.

IV. Plaintiffs Stated a Cause of Action for Unjust Enrichment.

Defendant alleges that Count I of the Complaint should be dismissed because Plaintiffs fail to state a claim for unjust enrichment. Defendants express three reasons why they believe dismissal is appropriate, none of which is accurate.

First, Defendant misrepresents the parties' relationship in asserting that Plaintiffs failed to allege that they directly conferred a benefit on it. Plaintiffs introduced Drake to CMR, arranged for CMR to record and distribute Drake's music, and led to Aspire entering into the MOA pursuant to which Aspire furnished the exclusive recording services of Drake to CMR which lead to aforesaid 84,000,000.00 in revenue generated to CMR. This is the direct benefit Plaintiffs conferred on CMR, which CMR was aware of and voluntarily accepted.

Second, Defendant asserts that the unjust enrichment claim fails because Plaintiffs have an adequate remedy at law. This claim is asserted as an alternative remedy in the event it is

determined that Plaintiffs have no legal remedy. That is entirely appropriate. "[U]nder Florida law and federal law, a plaintiff may *plead* alternative claims for unjust enrichment and violations of an express contract, upon a showing that an express contract exists, the equitable claim fails." In *re: Wiand Receivership Cases,* 2008 WL 818509 (M.D. Fla. Jan. 28, 2008) (emphasis in original). Since Defendant contests the existence of an express contract[4], alternative pleading of this unjust enrichment claim is permissible. *In re: Managed Care Litigation,* 185 F.Supp 2d 1310, 1337-1338 (S.D. Fla. 2002). "Until an express contract is proven, under which an adequate remedy at law is available, a motion to dismiss a claim for unjust enrichment is premature." *Scantland v Jeffry Knight, Inc.*, 2010 WL 4117683 (M.D. Fla. Sept. 29, 2010).

Finally, Defendant, who says there is no express contract between Plaintiffs and CMR just a few pages later (Motion to Dismiss at pp. 14-15), claims that the unjust enrichment count must be dismissed because of this challenged agreement. As the prior paragraph establishes, this argument is not a basis to dismiss an alternative unjust enrichment claim. *Wiand,* 2008 WL 818509; *Managed Care Litigation,* 185 F.Supp 2d at1337-1338; *Scantland,* 2010 WL 4117683.

V. Plaintiffs Stated a Cause of Action for Accounting.

Defendant alleges that Count II of the Complaint should be dismissed because Plaintiffs have failed to state a cause of action for accounting. Defendant first says an accounting is inappropriate because there is no extensive or complicated account since Plaintiffs undisputedly gets 22% of the net profits. That is true. What Defendant neglects to address, and what this accounting claim is intended to remedy, is the extensive and complicated accounting necessary to determine the net profits from amount of gross revenue that is supposed to be paid to Plaintiffs. As the communications between Plaintiffs and Defendant attached to the Complaint

[4] Defendants challenge Plaintiffs' right to bring all of the legal claims it has asserted. Motion to Dismiss at pp. 9-15 (Counts III – conversion, IV – breach of fiduciary duty, VI – tortuous interference and VII – breach of contract). Plaintiffs do not dispute the Defendant's position as to several of these claims.

reveal, determining the net amount requires analysis of, among other things, "sales history", "cumulative mechanical royalties", "marketing costs", "producer royalties/recording cost", "litigation costs", and "Report of Licensing income" Complaint [D.E. 1] at p. 8, ¶ 38 (Exhibit B) each of these complicated calculations support the validity of the remedy of an accounting.

Defendant next says that no "fiduciary" relationship exist to support an accounting. An equitable claim for accounting "lies where the parties have a fiduciary relationship such as a partnership, or property has come into the hands of the defendant in which the plaintiff has an interest." *Capco Properties, LLC v Monterey Gardens of Pinecrest Condo.,* 982 So. 2d 1211, 1214 (Fla. 3rd DCA 2008). "[T]here can be grounds for an equitable accounting 'where the contract demands between litigants involve extensive or complicated accounts and it is not clear that the remedy at law is as full, adequate and expeditious as it is in equity.'" *Chiron v Isram Wholesale Tours & Travel Ltd.,* 519 So. 2d 1102, 1103 (Fla. 3rd DCA 1988).

Finally, Defendant once again contends that Plaintiffs do not lack an adequate remedy at law (yes, the same remedies at law that they later claim Plaintiffs cannot bring). As previously addressed, this is no basis to dismiss this equitable claim at this stage.

VI. Conversion.

Plaintiffs do not oppose the dismissal of their conversion claim.

VII. Breach of Fiduciary Duty.

Plaintiffs do not oppose the dismissal of the breach of fiduciary duty claim.

VIII. Constructive Trust.

Plaintiffs do not oppose the dismissal of their claim for a constructive trust, but seek leave to amend to seek a constructive trust as a remedy in those claims where it is appropriate. *Swope Rodante, P.A. v Harmon,* 85 So. 3d 508, 511 (Fla. 2nd DCA 2012); *Finkelstein v.*

Southeast Bank, N.A., 490 So. 2d 976, 984 (Fla. 4th DCA 1986);*Collinson v. Miller*, 903 So. 2d 221 (Fla. 2d DCA 2005).

VIIII. Tortious Interference.

Plaintiffs do not oppose the dismissal of the tortuous interference claim.

X. Plaintiffs Stated a Claim for Breach of Oral Contract.

Defendant alleges that Count VII of the Complaint should be dismissed because Plaintiffs failed to state a claim for breach of oral contract. For breach of an oral contract a plaintiff must allege that there was a mutual oral agreement and that the defendant breached such agreement, which resulted in damages. *Carole Korn Interiors, Inc. v. Goudie*, 573 So. 2d 923, 924 (Fla. 3d DCA 1999) (allegations that the plaintiff entered into oral contract with the defendants, that plaintiff provided the agreed services, that defendants breached the contract by refusing to pay, and that plaintiff suffered damages "sufficiently set forth a cause of action for breach of an oral contract."). Here, and as Plaintiffs clearly stated in their Complaint, there was an oral agreement between Plaintiffs and CMR to pay Plaintiffs and account to them for a 22% net profits portion of the gross revenue generated by Drake. The failure of the temporary MOA to accurately incorporate the terms of this oral agreement and differentiate what portion of the revenue was to go to Plaintiffs and what portion was to go to Aspire brought about the Settlement Agreement, and the undisputed direction to CMR to pay directly to Plaintiffs their share of the gross revenue. CMR's partial compliance with this oral agreement was demonstrated by paying Plaintiffs two-million dollars ($2,000,000.00) as a partial payment toward what is due. Complaint [D.E. 1] at pp. 2-5 & 14, ¶¶ 6-21 & 62-64. All of the essential terms of the oral contract are stated (Defendants will account and pay the agreed upon portion of the revenue). This case is unlike *Taste Trackers, Inc. v UTI Transport Solutions, Inc.,* 2014 WL 129309 *3 (S.D. Fla. Jan. 14,

2014), cited by Defendant in which "the Complaint is devoid of any mention of the compensation Defendant was to receive" and "it is unclear whether Plaintiff conveyed the delivery schedule."

Defendant's reference to what Plaintiffs may ultimately be able to prove at trial is inapplicable at this stage where Plaintiffs factual assertions must be accepted as true.

Defendant's assertion that the oral contract claim must be dismissed because of the Statute of Frauds is misplaced. The Statute of Frauds is an affirmative defense. Fed. R.Civ. P. 8(c). As such, it is not a basis to dismiss a claim. Further, Plaintiffs full or partial performance of its obligations pursuant to the oral agreement removes the oral contract from the statute of frauds. *Elliott v. Timmons*, 519 So. 2d 671 (Fla. 1st DCA 1998).

XI. Leave to Amend

In the event this Court determines that Plaintiffs have not adequately alleged any of its claims or any of its remedies, Plaintiffs seek leave to amend to sure such defects. *Denarii,* 2012 WL 500826 *6.

CONCLUSION

For the foregoing reasons this Court should deny Defendant's Motion to Dismiss or, in the Alternative, to Stay as to Counts I (unjust enrichment), II (accounting) and VII (breach of oral contract) and because Aspire is an indispensible party; and grant Plaintiffs leave to amend the Complaint (including, without limitation, the allegations regarding diversity jurisdiction and to assert constructive trust as a remedy).

Dated this 21 day of November 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on November 21, 2014, I filed the foregoing document titled: PLAINTIFF'S RESPONSE IN OPPOSITION TO "DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY, AND INCORPORATED MEMORANDUM OF LAW" with the Clerk of the Court via CM/ECF and the CM/ECF system will send a notice of electronic filing to the counsel and parties of record.

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