UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SOUNDKILLERS, LLC, a New York limited liability company Plaintiff vs. YOUNG MONEY ENTERTAINMENT, LLC, a Louisiana limited liability company and CASH MONEY RECORDS, INC., a Louisiana corporation Defendants	:	Civil Action No. 1:14-cv-07980-KBF

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR DEFAULT JUDGMENT

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Plaintiff The Soundkillers, LLC ("Plaintiff" or "The Soundkillers"), by and through its attorney Kaitlyn M. O'Neill, Esq., respectfully submits this Memorandum of Law in support of its Motion for Default Judgment against defendants Young Money Entertainment, LLC ("Defendant Young Money") and Cash Money Records, Inc. ("Defendant Cash Money") (collectively referred to hereafter as "Defendants"), pursuant to Federal Rule of Civil Procedure 55(b)(2) and Local Civil Rule 55.2(b).

I. PRELIMINARY STATEMENT

This action is for breach of contract. Defendants are in default, and the prerequisites for a default judgment have been met. Plaintiff now seeks default judgment, finding Defendants liable on all counts of Plaintiff's Complaint.

II. STATEMENT OF FACTS[1]

The facts relating to this case are set forth in greater detail in the Summons and Complaint and supporting exhibits submitted therewith. (Compl., ¶ 9). The key facts and procedural history are summarized below.

Plaintiff furnishes the services of Ramon Owen professionally known as "REO." (*Id.*) Mr. Owen is an established music producer and composer who, among other things, creates, composes, writes, and arranges sound recordings and their underlying compositions for various musical recording artists and record companies (hereinafter

[1] Citations to the complaint dated October 2, 2014 in Exhibit A (the "Complaint") shall hereafter be designated as "Compl., ¶ __." Citations to the Producer Agreement between The Soundkillers, LLC and Young Money Entertainment, LLC and Cash Money Records, Inc. (the "Producer Agreement") in Exhibit B shall hereafter be designated as "Ex. B ¶ __." Citations to the initial royalty statement issued by Cash Money Records, Inc. to Soundkillers, LLC dated December 31, 2012 (the "Initial Royalty Statement") in Exhibit C shall hereafter be designated as "Ex. C." Citations to the Cure Notice dated October 31, 2013 in Exhibit D shall hereafter be designated as "Ex. D." Citations to the Notice of Material Breach dated November 20, 2013 in Exhibit E shall hereafter be designated as "Ex. E." Citations to the Affidavit of Timothy Irby, sworn to on December 17, 2014, in Exhibit F (the "Irby Affidavit") shall hereafter be designated as "Irby Aff." Citations to the Affidavit of Sam Berk, sworn to on December 23, 2014, in Exhibit F (the "Berk Affidavit") shall hereafter be designated as "Berk Aff." The Clerk's Certificates of Default dated January 13, 2015 shall hereafter be designated as "Ex. G."

referred to as "Production Services"). (*Id.)* On or around August 26, 2011, Plaintiff entered into and executed a written agreement (the "Producer Agreement") with Defendant Young Money to furnish Mr. Owen's Production Services to Defendant Young Money on a non-exclusive basis in connection with producing one master sound recording titled "Mirror" (the "Master Recording"), embodying the performance of Defendant Young Money's recording artist Dwayne Carter professionally known as "Lil Wayne." (*Id.,* ¶ 10; Ex. B).

Pursuant to the Producer Agreement, Plaintiff furnished Plaintiff's Production Services to Defendant Young Money on a non-exclusive basis to produce the Master Recording for Defendant Young Money. (Compl., ¶ 11). These Production Services and the labor furnished by the Plaintiff were used directly or indirectly by the Defendants and their affiliates in the creation of the Master Recording, which was thereafter exploited and sold by Defendants. (*Id.,* ¶ 12). Pursuant to the Producer Agreement, Defendant Cash Money distributed the Master Recording Plaintiff produced pursuant to certain agreements between Defendants Young Money and Cash Money. (*Id.,* ¶ 13). In addition, Defendant Cash Money, in strict accordance with the Producer Agreement, at all times owed an explicit duty to Plaintiff to account directly to Plaintiff as to all royalties accruing or which otherwise would have accrued pursuant to the Producer Agreement. (*Id.,* ¶ 14; Ex. B ¶ 6).

Plaintiff has performed all work in a satisfactory manner, and Defendant Young Money, along with Defendant Cash Money, has accepted such work. (Compl. ¶ 15; Ex. B ¶ 1(b)). In fact, in August 2011, Defendants released the "Carter IV" album (the "Album") embodying the Master Recording, which was produced by Plaintiff for

Defendants under the terms of the Producer Agreement. (Compl. ¶ 15). In exchange for Plaintiff's Production Services, Defendant Young Money agreed to pay Plaintiff specified producer royalties resulting from the exploitation of the Master Recording. (*Id.,* ¶ 16). Specifically, pursuant to the Producer Agreement, Defendant Young Money expressly agreed to remunerate Plaintiff, by paying Plaintiff a pro-rated royalty of three percent (3%) of the Royalty Base for Net Sales through Normal Retail Channels in the Unites States of albums which would increase to three and one half percent (3.5%) if sales of the album exceed five hundred thousand (500,000) and subsequently would increase to four percent (4%) if sales of the album exceed one million (1,000,000). (*Id.,* ¶ 17; Ex. B ¶ 5(a)). Moreover, in accordance with the Producer Agreement, Defendant Young Money expressly agreed that Plaintiff would maintain a certain undivided interest in the worldwide copyright and all other rights in the controlled composition written and/or and embodied in the Master Recording. (Compl., ¶ 17; Ex. B ¶ 9(b)).

Upon information and belief, as a result of Plaintiff's efforts, Defendants and their affiliate companies have, according to Nielson Soundscan, sold over 2,000,000 copies of the Album embodying the Master Recording and, upon information and belief, have received millions of dollars in gross income in connection with such sales. (Compl., ¶ 19). Defendants issued to Plaintiff the royalty statement dated December 31, 2012 (the "Initial Royalty Statement"). (Compl. ¶ 20; Ex. C). According thereto, Defendants owed Plaintiff $91,841.50, but did not include payment with the Statement. (Compl., ¶ 20, Ex. C).

Plaintiff has complied with all notice provisions of the Producer Agreement in requesting payments due and owed to Plaintiff. (Ex. B ¶¶ 17,19). Per the terms of the

Producer Agreement, counsel for Plaintiff sent a Cure Notice on October 31, 2013 to counsel for Defendant Cash Money and sent a courtesy copy of the same to counsel for Defendant Young Money. Neither of the Defendants responded to such notice. (Compl., ¶ 21; Ex. D). As a result of failing to respond to the Cure Notice, Defendants were in material breach of the Producer Agreement under the terms of the same and counsel for Plaintiff sent counsel for Defendant Cash Money notice of the material breach on November 20, 2013; counsel for Plaintiff sent a copy of the Notice of Material Breach to counsel for Defendant Young Money. (Compl., ¶ 22; Ex. E).

Defendants owe Plaintiff significant sums of money stemming from the Producer Agreement and Master Recording. (Compl., ¶ 23). Presently, however, Defendants have ceased to compensate Plaintiff with the monies to which Plaintiff is entitled in accordance with the Producer Agreement, and, instead, have retained a vast bulk of all profits for Defendants' own account. (*Id.,* ¶ 24). Moreover, Defendants have each failed and/or refused and continue to fail and/or refuse, despite numerous requests, to furnish Plaintiff with monies owed which are reflected in the Initial Statement. (*Id.,* ¶ 25). Also, Defendants have each failed and/or refused and continue to fail and/or refuse, despite numerous requests, to furnish Plaintiff with an accounting of producer royalties owed to date. (*Id.,* ¶ 43). The Master Recording and Album have had further sales since December 31, 2012, and Defendants continue to retain profits. (*Id.*) Despite demand, Defendants have failed and/or refused to pay Plaintiff the Plaintiff's share of the royalties stemming from the exploitation of the Master Recording and the underlying composition thereof. (*Id.,* ¶ 26).

III. PROCEDURAL BACKGROUND

On October 2, 2014, Plaintiff filed the Summons and Complaint with the Court. (Compl.) Pursuant to Federal Rule of Civil Procedure 4(d), Plaintiff served the Complaint along with a Waiver of the Service of Summons on October 31, 2014 to Defendants. Defendants failed to return the Waiver within the thirty (30) day time period. Plaintiff then served the Summons and Complaint on Defendants. A true and correct copy of the Summons and Complaint was served upon Defendant Cash Money on December 15, 2014. (Irby Aff.) A true and correct copy of the Summons and Complaint was served upon Defendant Young Money and completed on December 22, 2014. (Berk Aff.) Plaintiff filed Proof of Service on December 30, 2014. Defendants have failed to respond or otherwise defend as provided by the Federal Rules of Civil Procedure and more than twenty-one days have passed since service of the Summons and Complaint. Defendants have not been granted an extension of time to respond, nor have they served or filed answers or any other response. On January 13, 2015, the Clerk of the Court entered default against Defendants. (Ex. G).

IV. ARGUMENT

A. Default Judgment is Proper

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332(a), as the amount in controversy is in excess of $75,000.00, and there is complete diversity of citizenship between the Plaintiff and all of the Defendants. Venue in this Judicial District is proper under 28 U.S.C. § 1391. A court may order a default judgment pursuant to Federal Rule of Civil Procedure 55(b)(2) following the entry of default by the court clerk under Rule 55(a). (Fed. R. Civ. P. 55.) Upon entry of default, the well-pleaded

factual allegations of a plaintiff's complaint, other than those related to damages, will be taken as true. *Garcia v. Giorgio's Brick Oven & Wine Bar*, 2012 U.S. Dist. LEXIS 118393, *2 (S.D.N.Y. 2012) (citing *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.,* 973 F.2d 155, 158 (2d Cir. 1992)). In this case, the Complaint and the declaration filed in this action clearly demonstrate that default judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure should be entered against each Defendant.

B. Factual Allegations Establish Defendants' Liability

1. Plaintiff Is Entitled To The Entry Of A Default Judgment Against Defendants On Plaintiff's Breach of Contract Claim

Under New York law, to establish a *prima facie* case for breach of contract, a plaintiff must plead and prove: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from the breach. *RIJ Pharm. Corp. v. Ivax Pharms., Inc.,* 322 F.Supp.2d 406, 412 (S.D.N.Y.2004); *see also First Investors Corp. v. Liberty Mut. Ins. Corp.,* 152 F.3d 162, 168 (2d Cir.1998). Satisfying each and every one of these elements, Plaintiff has properly pleaded the existence of a contract between the parties (Compl., ¶¶ 10); Plaintiff's performance of that contract (Compl., ¶¶ 11-13, 15) and breach of the contract by Defendants (Compl., ¶¶ 24-26).

Plaintiff have also established Plaintiff's entitlement to damages in the amount of $91,841.50 as well as a full accounting to date. A default judgment that is entered on the well-pleaded allegations in a complaint establishes a defendant's liability, *see Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 854 (2d Cir. 1995); *S.E.C. v. Management Dynamics, Inc.*, 515 F.2d 801, 814 (2d Cir. 1975), and the sole issue that remains before the Court is whether the plaintiff can show, with "reasonable certainty," entitlement to the amount of damages it seeks. *Credit Lyonnais Securities (USA), Inc. v. Alcantara*, 183

F.3d 151, 155 (2d Cir. 1999); *Greyhound Exhibitgroup,* 973 F.2d at 155, 158. Defendants issued to Plaintiff the Initial Royalty Statement for royalties due and owed to Plaintiff in the amount of $91,841.50. (Compl., ¶ 20, Ex. C). Moreover, Defendants have failed to provide Plaintiff with an accounting of producer royalties beyond such Initial Royalty Statement, despite the Master Recording and Album having had further sales since the Initial Royalty Statement was issued to Plaintiff. (Compl., ¶¶ 43).

In addition, New York law provides that prejudgment interest of 9% is to be awarded for claims arising from "a breach of performance of a contract." CPLR §§ 5001(a), 5004; *see, e.g., A I Marine Adjusters, Inc. v. M/V Siri Bhum*, 2007 WL 760415, at *5 (S.D.N.Y. Feb. 8, 2007) "A plaintiff who prevails on a claim for breach of contract is entitled to prejudgment interest as a matter of right." *Chaman LAL Setia Exports Ltd. v. Sawhney*, 2003 WL 21649652, at *4 (S.D.N.Y. May 28, 2003) (citing *U.S. Naval Institute v. Charter Communications, Inc.*, 936 F.2d 692, 698 (2d Cir. 1991)). "Interest shall be recovered upon a sum awarded because of a breach of performance of a contract ... [and] interest shall be computed from the earliest ascertainable date the cause of action existed ...." CPLR § 5001(a)(b). Here, the earliest ascertainable date that Plaintiff's cause of action existed is December 31, 2012; the date of the Initial Royalty Statement. (Compl., ¶¶ 20, Ex. C). Accordingly, Plaintiff is entitled as part of its judgment, prejudgment interest at the rate of 9% per annum from December 31, 2012.

2. <u>In the Alternative, Plaintiff Is Entitled To Entry Of A Default Judgment Against Defendants On Plaintiff's Remaining Claims For Relief</u>

Plaintiff has properly alleged facts sufficient for the entry of a default judgment against Defendants on theory of unjust enrichment. Under New York law, "a cause of action for unjust enrichment is stated where [the complaining parties] have properly

asserted that a benefit was bestowed by [them] and that [the alleged offending party] will obtain such benefit without adequately compensating [complaining parties]." *Korff v. Corbett*, 18 A.D.3d 248, 251, 794 N.Y.S.2d 374, 377 (1st Dep't 2005). The essence of a claim for unjust enrichment is that one party has parted with money or a benefit that has been received by another at the expense of the first party. *Kaye v. Grossman,* 202 F.3d 611, 616 (2d Cir.2000). In the present case, Defendants have directly and substantially benefited from Plaintiff's contractually provided Production Services, and have failed to pay for the same. (Compl., ¶ 37). Defendants have failed to make payments for the outstanding monies due and owed to Plaintiff. (Compl., ¶ 38). Defendants and their affiliate companies have, according to Nielson Soundscan, sold over 2,000,000 copies of the Album embodying the Master Recording and, upon information and belief, have received millions of dollars in gross income in connection with such sales. (Compl., ¶ 19). Upon information and belief, Defendants continue to receive profits from the sale of and contracts related to the Master Recording. (Compl., ¶ 45). As set forth above, Defendants have been unjustly enriched to Plaintiff's detriment.

3. Plaintiff Requests An Inquest To Determine The Full And Updated Accounting

"While default judgment constitutes an admission of liability, the quantum of damages remains to be established unless the amount of damages is liquidated or susceptible of mathematical computation." *ALV Events Int'l v. Johnson,* 821 F. Supp. 2d 489, 494 (D. Conn. 2010) (quoting *Flaks v. Koegel*, 504 F.2d 702, 704 (2d Cir. 1974)). In order to determine the amount of damages with reasonable certainty the Court may conduct an inquiry. *Au Bon Pain Corp. v. Artect, Inc*., 653 F.2d 61, 65 (2d Cir. 1981); *See also Lucerne Textiles, Inc. v. H.C.T. Textiles Co.*, 2013 U.S. Dist. LEXIS 42555 (entering

a default judgment and referring the matter to the magistrate for an inquest as to the amount of damages). In the present case, Plaintiff is unable to determine and prove the extent of actual damages in connection with the updated accounting without the benefit of discovery; therefore, an inquest is necessary to help determine the full and updated accounting. The Master Recording and Album have had further sales since the Initial Royalty Statement was issued to Plaintiff (Compl., ¶ 43) and without the benefit of discovery, the royalties due and owned to present date are unknown. Plaintiff respectfully requests an inquest to determine a full and updated accounting of royalties owed to Plaintiff.

C. Plaintiff Is Entitled To An Award Of Costs And Attorneys' Fees.

Pursuant to Federal Rule of Civil Procedure 4(d)(2), "If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the Court must impose on the defendant: the expenses later incurred in making service; and the reasonable expenses, including attorneys' fees, of any motion required to collect those service expenses." In the present case, Plaintiff served the Complaint along with a Waiver of the Service of Summons on October 31, 2014 to Defendants. By Defendants' failure to return the Waiver within the thirty (30) day time period, Plaintiff incurred $120.00 in costs for service of process. Further, Plaintiff's counsel reasonable spent approximately 20 hours in preparing this motion, amounting to $3,500.00 in fees. The total amount of costs and attorneys' fees is $3,620.00.

IV. CONCLUSION

As a result of Defendants' default, Plaintiff respectfully requests that the Court enter default judgment against Defendants in the amount of $91,841.50, plus interest thereon; a full and updated accounting; $3,620.00 for costs and attorneys' fees; and for such other and further relief that this Court deems just and proper.

Dated: January 15, 2014

Respectfully submitted,

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