SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CLAUDIA C. LEVY as EXECUTRIX Under the Last Will and Testament of JACQUES M. LEVY, also known as JACQUES LEVY, Deceased, and JACKELOPE PUBLISHING COMPANY, INC.,

Plaintiffs,

v.

ROBERT ZIMMERMAN, also known as BOB DYLAN, and doing business as RAM'S HORN MUSIC, SPECIAL RIDER MUSIC and/or BOB DYLAN MUSIC CO., UNIVERSAL MUSIC GROUP, INC. and doing business as UNIVERSAL MUSIC GROUP, UNIVERSAL MUSIC PUBLISHING, INC. and doing business as UNIVERSAL MUSIC PUBLISHING GROUP, and JOHN DOES 1-10,

Defendants.

Index No. 650402/2021

Part 61 Commercial Division

Hon. Barry Ostrager

Motion Sequence No. 001

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Dated: New York, New York
March 23, 2020

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Defendants Bob Dylan (d/b/a Ram's Horn Music, Special Rider Music, and/or Bob Dylan Music Co.) ("Dylan"), Universal Music Group, Inc., and Universal Music Publishing, Inc. (the latter two together, "Universal") respectfully submit this memorandum in support of their Motion to Dismiss the Complaint pursuant to CPLR 3211(a)(1) and (a)(7).

PRELIMINARY STATEMENT

This lawsuit is an opportunistic attempt to rewrite a 45-year-old contract to obtain a windfall payment that the contract does not allow. The complaint should be dismissed with prejudice.

Bob Dylan is a Nobel laureate and world-renowned musician and songwriter. This case involves ten of his songs. Over the course of his 60-year career, Dylan has written more than 600 songs, including such classics as "Blowin' in the Wind," "Like a Rolling Stone," "All Along the Watchtower," and "The Times They Are A-Changin'." The vast majority of the songs were written by Dylan alone; a handful were written in collaboration with other songwriters. A notable example of Dylan's collaboration is his album "Desire." Dylan co-wrote ten songs with now-deceased songwriter Jacques Levy, and seven of them are on that album.

In late 2020, in a widely reported transaction, Dylan sold his entire catalog of songs to Universal, relinquishing forever all rights and interests in the songs for a lump sum payment (the "Universal Sale"). After learning of the Universal Sale, Plaintiff Claudia Levy, the executrix of Levy's estate, saw an opportunity to extract money from Dylan. Plaintiffs filed this breach-of-contract action seeking a substantial cut of the purchase price Universal paid to Dylan.

The plain language of the contract at issue—a 1975 employment agreement between Dylan and Levy (the "Agreement")—and basic principles of contract interpretation foreclose Plaintiffs' claims.

The Agreement is a standard work-for-hire agreement between Dylan and Levy. It grants Dylan full ownership of the copyrights in the ten songs on which the two collaborated, making the songs Dylan's "sole property," and giving him the exclusive right to sell the copyrights. Agreement §§ 2, 9. The Agreement designates Levy as the "Employee" and specifies his compensation as 35% of the royalty payments from Dylan's licensing of the songs for things like TV commercials or performance on the radio. *Id*. § 7. Nothing in the Agreement remotely suggests that the parties agreed to bestow on Levy the windfall Plaintiffs demand here.

The compensation provision in Section 7 is clear and indisputable. It entitles Levy to a share of the royalty payments from use of the songs—and nothing more. It identifies the main ways in which the songs can be licensed and expressly identifies the "income" of which Levy gets 35% as income paid by "licensees." Section 7 does not say anything about giving Levy a cut of the proceeds from the *sale* of Dylan's copyrights in the songs. Even in the section of the Agreement addressing a potential sale of the copyrights, Section 9, the parties did not grant Levy a right to any of the sale proceeds, but rather confirmed that his compensation was limited to a share of royalty payments under Section 7. Licensing songs for an ongoing revenue stream is categorically different than selling absolute title in those songs for a one-time payment, and Plaintiffs are trying to stretch the words of Section 7 far beyond their intended meaning. Because Section 7—which sets forth the sole basis for compensating Levy—does not encompass payments from the sale of copyrights, Plaintiffs are not entitled to a share of the proceeds from the Universal Sale.

The breach of contract claim fails for another independent reason. Section 7 limits Levy's compensation to specific types of "income earned by the [songs] and received by the Publisher." And because "Publisher" is defined in Section 16 to include Dylan *and his* *successors or assigns*—i.e., Universal—the Publisher did not receive any income when Universal paid Dylan. This provision further demonstrates that Levy is entitled to a share of royalty payments (which do constitute "income … received" by the Publisher) but not a share of sale proceeds (which do not). Defining Publisher to include a new owner was an important term in the Agreement because it ensured that the new owner would continue paying Levy his share of royalty payments. But it *also* meant that a sale of the songs would fall outside Section 7's payment obligation, because the Publisher plainly did not earn or receive income from the sale.

In selling his catalog, Dylan gave up his right to future income from the songs. Plaintiffs, in contrast, lost nothing in the Universal Sale. To the contrary, Universal has agreed to assume the obligation as Publisher to pay royalties to Plaintiffs. Thus, for Plaintiffs, the revenue stream will continue: the only effect of the Universal Sale is that the royalty checks will now come from Universal rather than from Dylan.

Plaintiffs are seeking an impermissible double-dip. They want *both* the continuing royalty payments from Universal *and* a piece of what Universal paid to buy out Dylan. It would be commercially unreasonable, grossly unfair, and downright absurd to pay Plaintiffs their continued stream of royalty payments *in addition to* a share of the sale money when the only rights relinquished in the sale were Dylan's, not Plaintiffs'. Put differently, the sale money reflects the value of the stream of future royalty payments to Dylan. It follows that Plaintiffs are not entitled to a share of the sale money when they have not sold their stream of future royalty payments.

Plaintiffs' claims against Universal are a meritless afterthought. Plaintiffs lack standing to sue Universal for allegedly breaching the agreement between Dylan and Universal (the "Universal Contract") because Plaintiffs are not third-party beneficiaries of that contract and there was no breach in any event. Likewise, their tortious interference claim fails because the complaint does not adequately allege a breach of the Agreement, let alone one caused by Universal.

This Court should hold Plaintiffs to the plain language of the contract that Levy signed 45 years ago and dismiss this entire lawsuit with prejudice.

FACTUAL BACKGROUND

I. Dylan's Ownership of His Catalog

Federal copyright law protects the lyrics and music of a song, known as the "musical composition." The owner of a musical composition copyright can make money from a song either by selling the copyright (like Dylan did in the Universal Sale) or, more commonly, by retaining ownership and licensing the copyright for others to use in specific ways (like Dylan did for 50 years before the Universal Sale). This is no different than any other property. Take an apartment—the owner can make money by selling it or renting it out. Copyright owners generate licensing revenue (i.e., royalties) by granting people permission to put the copyrighted song on a record, feature it in a commercial, or play it on the radio (or on a streaming platform like Spotify).

Not all songwriters own the copyrights to the musical compositions of their songs. Dylan was an exception. *See* Jon Blistein, *Bob Dylan Sells Entire Songwriting Catalog to Universal Music Publishing*, Rolling Stone (Dec. 7, 2020), https://tinyurl.com/ygkof3kz. Dylan owned the songs he wrote by himself as well as the handful he wrote with co-writers like Levy. For those co-written songs, Dylan maintained sole ownership of the copyrights because his co-writers generally contributed as work-for-hire employees, disclaiming any copyright ownership in exchange for compensation in the form of a percentage of the royalties from licensing the songs, as Levy did here.

II. The Agreement

Seven songs on Dylan's 1976 album "Desire" were written by Dylan with Levy. *See* Compl. ¶¶ 1, 13, 15. Consistent with industry custom and practice practice, the parties agreed that Dylan would own the copyrights and Levy's role was as an "employee-for-hire." Under the Constitution and federal copyright law, copyright holders own the exclusive rights to their original works. Where, as here, a work is "prepared by an employee within the scope of his or her employment," 17 U.S.C. § 101—an arrangement known as work-for-hire—"the employer or other person for whom the work was prepared is considered the author for purposes of [the Copyright Act], and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright," 17 U.S.C. § 201(b). *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

The Agreement between Ram's Horn Music (a d/b/a name for Dylan) as "Publisher" and Jacques Levy as "Employee" is a classic work-for-hire agreement. It expressly provides that Levy was an "Employee" contributing songwriting services on a work-for-hire basis in exchange for royalty income only. *See* Ex. 2 at 1.[1] Section 1 makes this plain: "Publisher [Dylan] hereby employs Employee [Levy] as its employee-for-hire and Employee accepts such employment to write the lyrics of certain original musical compositions …." Ex. 2 § 1.

Section 2 confirms that "Publisher shall be deemed the author … with respect to the material written by Employee hereunder, with Employee acting as Publisher's employee-for-hire hereunder." Ex. 2 § 2. Section 2 further provides that "the Compositions"—ten songs listed in Schedule A to the Agreement—would be the "sole property of Publisher, everywhere and forever, with all copyrights therein," and that Levy as Employee "sells, assigns, transfers and sets

[1] Citations to "Ex. __" refer to exhibits to the Affirmation of Orin Snyder filed with this motion.

over unto Publisher all Employee's right, title and interest in and to the Compositions (lyrics, music and titles)," which "shall vest in Publisher immediately upon their creation." *Id*.

Section 9 specifically addresses the sale of the copyrights, providing that Dylan "shall have the right to … sell … the Compositions and all copyrights," subject only to "the payment of compensation to Employee as herein provided." *Id.* § 9. And the parties agreed that, in the event of a sale, the new owner would assume the role of "Publisher" and take on Dylan's obligations under the Agreement: "The term 'Publisher' as used throughout this agreement shall be deemed to apply to Publisher and its designees, successors, assigns or its associated or affiliated companies." *Id.* § 16.

Levy's compensation as "Employee" is addressed in Section 7. Levy agreed to be paid 35% of "income earned by the Compositions and actually received by Publisher" from royalties received for licensing the copyrights in the United States and Canada. *Id.* § 7(a). The Agreement encompasses royalties arising from the licensing of "mechanical rights, electrical transcriptions, reproducing rights, motion picture synchronization and television rights, and all other rights therein." *Id.* These enumerated rights reflect the traditional and primary ways royalty income is generated through licensing songs. *See* Al Kohn & Bob Kohn, Kohn on Music Licensing, at 84 (4th ed. 2010) (describing the major sources of music publishing income). Mechanical rights are the rights to reproduce songs to be played via audio cassettes, CDs, and digital formats. *See, e.g.*, *In re Cellco P'ship*, 663 F. Supp. 2d 363, 369 (S.D.N.Y. 2009). Electrical transcriptions refer to the use of a song for public broadcast (i.e., radio). Reproducing rights (as used here) refer to the right to reproduce songs for use in, for example, ring tones or consumer products like music boxes. And synchronization rights refer to the reproduction of musical compositions to be used in audiovisual works, such as television shows or movies. *See,* *e.g.*, *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 567 (2002). While there are other types of licensing rights that can generate income for the copyright holder—such as "grand rights," mentioned in Section 2, which refer to the right to perform a song in a play—the four rights enumerated in Section 7(a) reflect the main types of income a copyright owner receives from licensing musical compositions.

From 1975 until the Universal Sale in 2020, Dylan paid Plaintiffs 35% of royalty income under Section 7(a) of the Agreement. All told, Dylan paid Plaintiffs more than $1,000,000 over this period.

III. The Universal Sale

On November 20, 2020, Dylan and Universal entered into the Universal Contract for the sale of Dylan's entire catalog of over 600 songs.[2] *See* Compl. ¶ 28. In exchange for a lump-sum payment, Dylan gave up "all of [his] rights with respect to every song in [his] catalog," including all future licensing income he would have received as the owner. *See* Compl. ¶ 29. As a result, Dylan no longer owns the copyrights or has any right to royalties from their exploitation.

Dylan ensured that Plaintiffs retained their rights to future royalty income. As Plaintiffs concede, Universal knew that its purchase of Dylan's catalog came with certain "obligations, inter alia, to account and pay to Plaintiffs [and to other collaborators with royalty rights] all funds due pursuant to" Dylan's preexisting royalty arrangements with those collaborators. Compl. ¶ 33. Dylan thus extinguished his own rights in the songs at the same time he made sure that Plaintiffs' right to compensation from future uses of the songs was preserved.

[2] The sale of Dylan's catalog is just one of many catalog sales by major artists in recent years, beginning with David Bowie's sale of future profits from his pre-1993 albums and songs for $55 million. *See* MTV News Staff, *Bowie Sells Himself on Wall Street*, MTV (Feb. 12, 1997), https://tinyurl.com/yz6rafpf; *see also* Mark Sweney, *Going His Own Way: Mick Fleetwood Sells Song Rights to BMG*, The Guardian (Jan. 14, 2021), https://tinyurl.com/y3o66o5x (mentioning sales by Stevie Nicks, Neil Young, and Shakira).

IV. Procedural History

Plaintiffs filed this lawsuit on January 20, 2021, asserting three causes of action: Breach of Contract against Dylan, Breach of Contract against Universal, and Tortious Interference with Contract against Universal. This Court should dismiss each with prejudice.

LEGAL STANDARD

Dismissal is required under CPLR 3211(a)(7) where "the pleading fails to state a cause of action." Because the "[i]nterpretation of [a] contract is a legal matter for the court," the contract's "provisions establish the rights of the parties and prevail over conclusory allegations of the complaint." *805 Third Ave. Co. v. M.W. Realty Assocs.*, 58 N.Y.2d 447, 451 (1983) (citations omitted). A court must therefore dismiss a breach of contract claim that is precluded by the contract's plain language. *See, e.g*, *FCRC Modular, LLC v. Skanska Modular LLC*, 159 A.D.3d 413, 414 (1st Dep't 2018) (affirming dismissal of breach of contract claims and explaining that "parol evidence is unnecessary where, as here, the contract terms are unambiguous"); *Silvester v. Time Warner, Inc.*, 1 Misc. 3d 250, 255-57 (Sup. Ct. N.Y. Cty. 2003) (dismissing breach of contract claim brought by recording artists where the plain terms of the agreements conveyed full ownership rights to defendants).

Dismissal is also required under CPLR 3211(a)(1) "where 'the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dep't 2004) (citation omitted); *see also* CPLR 3211(c) (motion to dismiss may be supported with "any evidence that could properly be considered on a motion for summary judgment"). On a motion to dismiss, "factual allegations … that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not" accepted as true, *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dep't 2003), and "are insufficient to survive a motion to dismiss," *Godfrey* *v. Spano*, 13 N.Y.3d 358, 373 (2009). When documentary evidence such as a contract forecloses allegations of breach, the claim must be dismissed "even if the allegations, standing alone, could withstand a motion to dismiss." *Mitkowski v. Marceda*, 133 A.D.3d 574, 575 (2d Dep't 2015) (affirming dismissal under CPLR 3211(a)(1)); *see also 150 Broadway*, 14 A.D.3d at 5 (contract established defendants were entitled to dismissal).

ARGUMENT

I. <u>The Breach of Contract Claim Against Dylan Should Be Dismissed</u>

The plain language of the Agreement establishes that Plaintiffs are not entitled to a share of the proceeds from Dylan's sale of his copyrights. A contract must be "read as a whole to determine its purpose and intent." *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). "A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties." *Brad H. v. City of New York*, 17 N.Y.3d 180, 185 (2011). Courts "apply this rule with even greater force in commercial contracts" like this one, "negotiated at arm's length by sophisticated, counseled businesspeople." *Ashwood Cap., Inc. v. OTG Mgmt., Inc.*, 99 A.D.3d 1, 7 (1st Dep't 2012). The Agreement, which was entered into by sophisticated, counseled parties, is "unambiguous on its face," *Beinstein v. Navani*, 131 A.D.3d 401, 405 (1st Dep't 2015), and "reasonably susceptible of only one meaning," *Greenfield*, 98 N.Y.2d at 570. Plaintiffs are entitled to royalties only. They are not entitled to copyright sale proceeds.

A. The Agreement's Plain Language Forecloses Plaintiffs' Claim.

The Agreement unambiguously establishes that Dylan is the sole owner of the copyrights with the exclusive right to the proceeds from selling his songs. Levy, an "Employee," is entitled to royalty compensation only.

Levy's compensation for his services as "Employee" is addressed in Section 7 of the Agreement. That section provides, in relevant part:

> In consideration of Employee's services hereunder … Publisher shall pay, or shall request third parties as hereinafter specified, to pay Employee the following compensation with respect to the Compositions:
>
> (a) Thirty-five (35%) percent of any and all income earned by the Compositions and actually received by Publisher from mechanical rights, electrical transcriptions, reproducing rights, motion picture synchronization and television rights, and all other rights therein, (expressly excluding any income or royalties earned in respect of printed editions of the Compositions) …. Publisher shall have the right, but not the obligation, to cause and direct its licensees to pay the aforesaid income directly to Employee or his designee.

Ex. 2 § 7. The proceeds from the Universal Sale fall outside the scope of Section 7's compensation provision for two main reasons: They are not royalty payments arising from licensing the songs; and the sale proceeds are not "income … received" by the Publisher.

1. Section 7(a) gives Levy a right to royalty payments, but not to a share of sale proceeds. The obligation to pay Levy is triggered only by royalty income the Publisher receives from licensing the songs, including through the types of licenses specified in the Agreement (e.g., mechanical rights, reproducing rights, television rights, etc.). Even assuming sale proceeds could ever qualify as "income earned by the Compositions" (contrary to the common understanding of "income" in the music industry), the parties here added a critical limitation: the compensation obligation extends only to income earned and received from licensing rights in the songs. Proceeds from a sale of the copyrights is excluded. That Section 7(a) is confined to licensing income is further confirmed by the provision later in the paragraph giving the Publisher the right "to cause and direct its *licensees* to pay the aforesaid income directly to [Levy] or his designee." Ex. 2 § 7 (emphasis added). By stating that the "aforesaid income"—that is, the "income" that triggers the Publisher's compensation obligation in Section 7(a)—is paid by "licensees," the parties plainly understood Section 7(a) as encompassing licensing revenues only.

Notably absent from Section 7(a) is any mention of the proceeds arising from a sale of the copyrights. This was not an inadvertent omission. One of the key rights of a copyright owner is the right to sell the copyright, *see* 17 U.S.C. § 201(d), and the Agreement devotes an entire section to Dylan's right to sell the songs. Section 9 provides:

> Publisher shall have the right to assign, transfer, sell or otherwise dispose of the Compositions and all copyrights and renewals or extensions thereof and other rights granted Publisher hereunder, either expressly or by operation of law subject, however, to the payment of compensation to Employee as herein provided.

Ex. 2 § 9. Had the parties intended for Levy to share in the proceeds of a sale, they would have so provided in the Agreement. But they did not. Neither Section 7(a) nor Section 9 so much as hints that Levy is so entitled. Section 7(a) gives Levy a right to a share of royalty payments, and Section 9 simply confirms that any sale of the copyrights is subject "to the payment of compensation to Employee as herein provided"—i.e., that the new owner acquire the copyrights subject to the continuing obligation to pay Levy his share of royalty payments pursuant to Section 7(a).

"Courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include," *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72 (1978); *see also Morlee Sales Corp. v. Mfrs. Tr. Co.*, 9 N.Y.2d 16, 19 (1961) ("[C]ourts may not by construction add or excise terms …."); *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 560 (2014) ("[I]f parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission."). That principle applies with special force here, where Section 7(a) expressly confers limited rights—spelling out the details of payments from licensing mechanical rights, for example—but makes no mention of a right to sale proceeds. That omission speaks volumes because the right to sale proceeds is a far more important and valuable right than all the other rights that are listed. Moreover, the right to sale proceeds is not a right that employees would ordinarily possess under copyright law. *See Hooper Assocs., Ltd. v. AGS Computs., Inc.*, 74 N.Y.2d 487, 492 (1989) ("[T]he court should not infer a party's intention to [depart from legal default rules] unless the intention to do so is unmistakably clear from the language of the promise."). Contracts, like statutes, are presumed not to "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *cf. Gallo v. Moen, Inc.*, 813 F.3d 265, 269 (6th Cir. 2016) (applying this principle to contract interpretation). Here, where the parties *expressly* identified the specific licensing arrangements for which Levy would be paid compensation, there is absolutely no reason to interpret the Agreement as *impliedly* giving Levy the greatest treasure of them all—a share in the proceeds from the sale of the copyrights.

The parties knew how to refer to sale of the Compositions when they wanted to. Section 9 recognizes Dylan's "right to assign, transfer, *sell* or otherwise dispose of the Compositions." Ex. 2 § 9 (emphasis added). The parties' explicit reference to a "sale" in Section 9 but not in Section 7(a) further demonstrates that their decision not to include "sale" proceeds in Section 7(a) was deliberate. *See, e.g.*, *Medinol Ltd. v. Boston Sci. Corp.*, 346 F. Supp. 2d 575, 598 (S.D.N.Y. 2004) (finding that a contractual term should not be read into a provision from which it is absent where the parties "purposefully included" it elsewhere).

2. The sale proceeds are not "income … received" by the Publisher because the Publisher includes both Dylan and Universal. Section 16 of the Agreement defines Publisher to mean not just Dylan, but Dylan's "designees, successors [and] assigns"—i.e., Universal. Ex. 2 § 16. Thus, Universal's payment to Dylan does not amount to "income … received" by the Publisher. Even if *Dylan* could be deemed to have received income from the sale, *Universal* paid money—and consequently the Publisher did not receive income from the transaction. Section 16 confirms that Section 7's compensation provision is confined to payments, such as royalty payments, that the Publisher receives from a third-party licensee. Section 7 excludes proceeds from a sale of the copyrights because the new owner is the Publisher and plainly does not receive income from buying the copyrights.

The parties' decision to define "Publisher" as including the new owner of the copyrights makes perfect sense. By binding the new owner to the terms of the Agreement, Section 16 ensured that Levy would continue receiving his share of licensing royalties notwithstanding a change in ownership. If Universal were *not* understood to be the Publisher in Section 7, Levy's entitlement to a continuing stream of royalty payments would evaporate.

In practice, Section 16 worked just as the parties intended. Universal, now standing in Dylan's shoes as the "Publisher" under the Agreement, has already provided a quarterly accounting statement to Plaintiffs, and will continue doing so going forward.

3. Plaintiffs' demand for punitive damages must be dismissed along with the breach-of-contract claim on which it rests. Moreover, it is deficient in its own right. "Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights." *Rocanova v. Equitable Life Assurance Soc'y of the U.S.*, 83 N.Y.2d 603, 613 (1994). Plaintiffs' unfounded and conclusory allegations that Dylan "engaged in a civilly wrong pattern and history of intentionally and maliciously ignoring and disregarding Plaintiffs' rights" and that Dylan's "breaches were attended by such historic and repeated malice and abuse that they evince a high degree of moral culpability," Compl. ¶ 49, fall far short of the "strict" standard of establishing "a pattern of similar conduct directed at the public generally" necessary to recover punitive damages for breach of contract. *Rocanova*, 83

N.Y.2d at 613. And even though Plaintiffs assert that "[u]pon information and belief, the Dylan Defendants have not paid to Plaintiffs all royalties and/or revenue in connection with the Compositions," Compl. ¶ 41, they never allege a single instance of a missed payment other than in connection with the Universal Sale.

B. Plaintiffs' Argument Violates Basic Principles of Contract Interpretation.

Plaintiffs' effort to squeeze a payout from the Agreement requires them to rewrite the plain terms of the Agreement and ignore longstanding canons of contract interpretation. Canons of construction and interpretation inform the threshold inquiry of whether a contract is clear and unambiguous, such that breach claims can be resolved as a matter of law. *See, e.g.*, *RM Realty Holdings Corp. v. Moore*, 64 A.D.3d 434, 437 (1st Dep't 2009) (looking to "well-settled canons of contract interpretation" in concluding that the written agreement was unambiguous and affirming dismissal of a breach of contract claim). Here, application of those canons confirms that the Agreement is unambiguous and "reasonably susceptible of only one meaning," and that there is no need to resort to extrinsic evidence. *Greenfield*, 98 N.Y.2d at 569-70.

Plaintiffs do not argue, nor could they, that the sale proceeds constitute "income earned . . . from mechanical rights, electrical transcriptions, reproducing rights [or] motion picture synchronization and television rights." Ex. 2 § 7(a). Instead, they contend that the provision's final reference to income earned from "all other rights therein" entitles them to a share of proceeds from the sale. Compl. ¶ 27. It does not.

The phrase "all other rights therein" cannot be read "isolated from the context." *Kass v. Kass*, 91 N.Y.2d 554, 566 (1998) (quoting *Atwater & Co. v. Panama R.R. Co.*, 246 N.Y. 519, 524 (1927)). Under the "old fundamental maxim" *noscitur a sociis*, "the meaning of a word in a provision may be ascertained by a consideration of the company in which it is found and the meaning of the words which are associated with it." *Popkin v. Sec. Mut. Ins. Co. of N.Y.*, 48

A.D.2d 46, 48 (1st Dep't 1975). "The meaning of a writing may be distorted where undue force is given to single words or phrases." *Westmoreland Coal Co. v. Entech, Inc*., 100 N.Y.2d 352, 358 (2003) (citation omitted); *accord S. Rd. Assocs., LLC v. Int'l Bus. Machines Corp.*, 4 N.Y.3d 272, 277 (2005) ("It is also important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases."). Plaintiffs' myopic reading of "all other rights therein" to include copyright *sale* proceeds—when those words appear in a provision that addresses only *licensing* income and has nothing to do with the sale of copyrights—defies this basic principle by ripping the language free from its context.

Plaintiffs' interpretation also violates the closely related canon of *ejusdem generis*. That canon provides that "a series of specific words describing things or concepts of a particular sort" can be "used to explain the meaning of a general one in the same series." *Matter of Riefberg*, 58 N.Y.2d 134, 141 (1983). "The canon of *ejusdem generis* is" regularly "employed to limit 'broad catch-all terms' in a manner consistent with other listed terms that are more specific." *In re Enron Creditors Recovery Corp.*, 380 B.R. 307, 322-23 (S.D.N.Y. 2008). "[U]nder *ejusdem generis,* where several specific terms are followed by a more general term, the general term is deemed to share the characteristics of the specific terms that precede it." *Id.* Here, the general term "all other rights therein" comes at the end of the series of specific rights to be licensed, and must be "deemed to share the characteristics of the specific terms that precede it." *Id.* at 322. As used here, "other rights" include grand rights or other analogous licensing rights that existed in 1975 or would exist in the future, such as the right to grant use on YouTube or on social media platforms. *Cf*. Ex. 2 § 2 (describing "grand rights and/or stage rights" and "all other rights now known or hereafter to become known" among the rights Dylan owned). In short, the meaning of the words "other rights" is informed by the series of specific *licensing* rights that precede it. *See*

Kohn & Kohn, Kohn on Music Licensing, at 84. The sale of the copyrights themselves is not "of a like nature" to the licensing of the copyrights for exploitation via radio, records, or film. *Popkin*, 48 A.D.2d at 48.

Finally, Plaintiffs' interpretation would lead to results that are "absurd, commercially unreasonable, [and] contrary to the reasonable expectations of the parties." *Matter of Lipper Holdings v. Trident Holdings*, 1 A.D.3d 170, 171 (1st Dep't 2003) (citations omitted). In *Lipper*, the First Department rejected an interpretation of a partnership agreement that would have "bestow[ed] a windfall on certain limited partners." *Id.* That reasoning applies with full force here. Plaintiffs' interpretation of the Agreement would "bestow a windfall" by allowing them to profit from the sale to Universal without giving up (as Dylan did) any copyright interest or other rights. It would also provide Plaintiffs with a "double-dip"—*both* the future royalty streams from Universal *and* a share of the lump sum payment Universal made to Dylan to buy out his right to future royalties. This is precisely the kind of absurd and commercially unreasonable result that courts must avoid. It cannot be the case that these parties, after agreeing that Dylan was the sole copyright owner with the sole right to sell the copyrights and Levy was merely an "Employee," actually intended that Levy would get the most substantial right of a copyright owner by reaping a windfall from a sale of the copyrights.

II. The Breach of Contract Claim Against Universal Should Be Dismissed

Plaintiffs' claim that Universal breached the Universal Contract, Compl. ¶¶ 50-55, should be dismissed for at least two reasons. Plaintiffs lack standing to assert the claim because they are neither parties to, nor third-party beneficiaries of, the Universal Contract. Moreover, they do not plausibly allege any breach of the Universal Contract.

Plaintiffs are not third-party beneficiaries. Because they are not parties to the Universal Contract, Plaintiffs contend that they are "third-party beneficiaries" or "implied third-party beneficiaries" of it. Compl. ¶¶ 51-52. Plaintiffs are wrong. To maintain a claim as third-party beneficiaries, Plaintiffs must establish: "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [Plaintiffs'] benefit and (3) that the benefit to [Plaintiffs] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [Plaintiffs] if the benefit is lost." *Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783, 786 (2006) (quoting *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 336 (1983)). "In order for a contract to confer enforceable third-party beneficiary rights, it must appear 'that no one other than the third party can recover if the promisor breaches the contract' or the contract language should otherwise clearly evidence 'an intent to permit enforcement by the third party.'" *Artwear, Inc. v. Hughes*, 202 A.D.2d 76, 82 (1st Dep't 1994) (quoting *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 45 (1985)).

It is not the case "that no one other than [Plaintiffs] can recover" for breach of the Universal Contract. *Artwear*, 202 A.D.2d at 82. If Universal breached the Universal Contract by failing to pay Dylan, Dylan could of course have sued. Moreover, Plaintiffs have not pleaded any facts that would establish that the Universal Contract "was intended for [their] benefit." *Mendel*, 6 N.Y.3d at 786. Indeed, there *are* no such facts, as the Universal Contract does not alter Plaintiffs' rights in any way. Just like other artists with whom Dylan has collaborated and to whom he has promised royalties (e.g., Tom Petty, Johnny Cash, George Harrison), Plaintiffs' rights under the prior Agreement continue just as before under the Universal Contract. Plaintiffs cannot establish the elements necessary to qualify as third-party beneficiaries.

Moreover, Plaintiffs cannot demonstrate that the Universal Contract "clearly evidence[s] an intent to permit enforcement by [Plaintiffs]." *Artwear*, 202 A.D.2d at 82 (quotation marks omitted).

No breach of Universal Contract. Plaintiffs have not alleged, and cannot allege, any breach of the Universal Contract, let alone a breach that has harmed them. Plaintiffs have not alleged a failure by Universal to pay royalties, for example. Nor could they. As noted, Universal has already issued a quarterly accounting statement to Plaintiffs, proving its commitment to paying Plaintiffs continuing royalties pursuant to the Agreement. Thus, Plaintiffs' breach of contract claim against Universal fails for the additional reason that they have not adequately alleged a breach or any injury resulting from a purported breach.

III. The Tortious Interference With Contract Claim Against Universal Should Be Dismissed

Plaintiffs' third claim—that Universal tortiously induced Dylan to breach the Agreement—also fails as a matter of law. "A claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach[;] and (4) damages." *Foster v. Churchill*, 87 N.Y.2d 744, 749-50 (1996). Plaintiffs cannot satisfy those elements.

The most obvious deficiency in Plaintiffs' tortious interference claim is that there was no breach of contract. *See NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp., Inc.*, 87 N.Y.2d 614, 620-21 (1996). As explained above, Dylan did not breach the Agreement. Because there was no breach of contract, the claim for tortious interference with contract must be dismissed.

Another fatal flaw is Plaintiffs' failure to plead any facts that would establish Universal *caused* the alleged breach of contract. *See, e.g.*, *Cantor Fitzgerald Assocs., L.P. v. Tradition N.*

Am., Inc., 299 A.D.2d 204, 204 (1st Dep't 2002); *Turk v. Angel*, 293 A.D.2d 284, 284 (1st Dep't 2002). The complaint contains nothing more than vague and conclusory allegations that Universal somehow induced Dylan to breach the Agreement and that Dylan would not have breached the Agreement but for Universal's wrongful actions. The lone factual allegation pertinent to the tortious interference claim is that Universal "conducted due diligence in connection with the Catalog Sale and knew of the Agreement's existence and the exact terms thereof." Compl. ¶ 58. But while that may support the first two elements of a tortious interference claim (the existence of a contract and the defendant's awareness of it), it says nothing about the third and fourth elements (the defendant's intentional procuring of a breach and resulting damage). There is not a single factual allegation in the complaint that supports the claim that Universal had anything to do with—let alone intentionally procured—any purported breach of contract by Dylan, or that Universal's actions injured Plaintiffs. "[M]ere speculation" is insufficient "to avoid dismissal of a tortious interference with contract claim." *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep't 2006).

In fact, Plaintiffs' tortious interference claim is at odds with the story they tell in their complaint. According to Plaintiffs, Dylan regularly breached the Agreement on his own, and without any inducement by Universal, by failing to pay Plaintiffs "synchronization license fees" and other "royalties and/or revenue in connection with the Compositions." Compl. ¶¶ 40-41. These are all gratuitous and false smears. But they underscore the falsities and incoherence that permeate the complaint and require that the tortious interference claim, like Plaintiffs' other two baseless claims, be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' complaint with prejudice under CPLR 3211(a)(1) and (a)(7).

Dated: New York, New York
March 23, 2021

Respectfully submitted,

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ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, Orin Snyder, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because it contains 6,145 words, excluding the parts of the memorandum exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: New York, New York
March 23, 2021

/s/ Orin Snyder
Orin Snyder