

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN FEDERATION OF MUSICIANS
OF THE UNITED STATES AND CANADA, : CASE NO. 15-CV-_____

Plaintiff, :

- against - : COMPLAINT

SONY MUSIC ENTERTAINMENT INC., : JURY TRIAL DEMANDED

Defendant. :
-----X

Plaintiff American Federation of Musicians of the United States and Canada (“AFM”) files this action against Sony Music Entertainment Inc. (“Sony”), and alleges as follows:

SUMMARY

1. This action is brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for violations of the Sound Recording Labor Agreement (“SRLA”), a collective bargaining agreement to which the Plaintiff AFM and Defendant Sony are parties.

2. The SRLA covers the wages, benefits and other conditions of employment of professional musicians in the making of sound recordings. The AFM is the exclusive bargaining representative of musicians employed under the SRLA, and Sony is an employer of such musicians.

3. The AFM charges Sony with multiple violations of the SRLA. Its First Claim for Relief asserted below seeks redress for Sony’s authorization of a recording session for a purpose prohibited by the SRLA. Specifically, Sony called musicians for a presumptive sound recording session under the SRLA when the intended and actual purpose was to provide musical underscore for a theatrical motion picture. As a result of Sony’s misuse of the SRLA, musicians

have been deprived of residual compensation to which they are entitled under prevailing industry standards for distributions of the film. The Second through Fifth Claims below arise as a result of Sony's failure to make "new use" payments to musicians as required by the SRLA for the incorporation of various covered sound recordings into other sound recordings or other electronic media. The Sixth Claim is brought for Sony's failure to compensate musicians for its release of music previously recorded for television as an audio and audiovisual disc set, in violation of the SRLA and other contractual obligations. The AFM now sues to recover breach of contract damages, including all outstanding new use payments and appropriate residual compensation, on behalf of the musicians who have suffered economic losses as a result of Sony's conduct.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 29 U.S.C. § 185 and 28 U.S.C. § 1331.

5. Venue is proper in the Southern District of New York under 29 U.S.C. § 185(a) and 28 U.S.C. §§ 1391(b).

PARTIES

6. The Plaintiff AFM is a "labor organization representing employees in an industry affecting commerce" within the meaning of 29 U.S.C. § 185. The AFM is the exclusive collective bargaining agent for approximately 80,000 professional musicians throughout the United States and Canada, including musicians employed in the production of sound recordings.

7. The Defendant Sony is a Delaware corporation with its principal executive office located at 550 Madison Avenue, New York, New York 10022. Sony employs professional musicians represented by the AFM in the production of sound recordings. Sony is an "employer" within the meaning of 29 U.S.C. § 185.

STATEMENT OF FACTS

8. The AFM, in its capacity as a labor organization, and Sony, in its capacity as an employer, are parties to the Sound Recording Labor Agreement, a labor agreement setting forth the wages, benefits and other conditions of employment of professional musicians in the production of sound recordings. The SRLA has been in continuous effect since 1948, as modified and extended from time to time through collective bargaining negotiations. The term of the SRLA, according to the most recently bargained successor agreement, expired on January 12, 2015, and was extended from that date through July 12, 2015. All of the facts alleged in this Complaint occurred during a time when the SRLA was in full force.

A. Sony's Misuse of the SRLA to Make a Motion Picture

9. The SRLA provides that Sony "shall only call or authorize a recording session in order to make a phonograph record." The terms "phonograph record" and "record" mean "any phonograph record, compact disc, tape recording or any other device reproducing sound, whether now in existence or which may come into existence." Notwithstanding these terms, supplemental provisions have been added to the SRLA through collective bargaining that specifically permit the production of music videos and concert digital versatile discs ("DVD's") in connection with the making of phonograph records.

10. The SRLA is thus very limited in scope, and different industry standards generally apply to other forms of electronic media entertainment. The AFM negotiates other collective bargaining agreements covering the services of musicians employed in other types of recording work, such as in motion pictures, television, internet productions, and commercial announcements. Each of the AFM's electronic media collective bargaining agreements is the result of arm's length dealing with the respective industry employers, and reflects the distinct

economics of each sector, including patterns of consumption, production costs, and revenue streams. Consequently, all of the AFM's media agreements contain provisions limiting their scope to specific purposes. Any AFM signatory employer that wishes to engage musicians for a purpose beyond the scope of the agreement to which it is signatory may sign a single project letter of acceptance to the appropriate agreement for that project. However, only when a recording session is called and documented under the appropriate AFM agreement can the AFM track and ensure the collection of residual and deferred compensation owed to musicians in accordance with industry standards that have evolved over many decades through the collective bargaining process.

11. An AFM agreement other than the SRLA that is of particular relevance to this case, though Sony is not signatory to it, is the AFM Basic Theatrical Motion Picture Agreement (hereinafter, "Motion Picture Agreement"). This agreement is the product of collective bargaining between the AFM and the major motion picture and television producers. It provides for the minimum wages, benefits and working conditions of musicians whose services are rendered in connection with the production of theatrical motion pictures. Pursuant to this agreement, musicians are paid no less than the applicable scale wages set forth for film recording sessions. The release of a soundtrack record in connection with any theatrical motion picture is permitted under the Motion Picture Agreement; however, with certain limited exceptions, additional payment must be made to the musicians. Musicians are also owed residual compensation calculated as a percentage of the producer's receipts for such things as the exhibition of films on television and for the distribution of films in any format designed for replay on home devices. Residuals under the AFM Motion Picture Agreement are collected and distributed by the Film Musicians Secondary Markets Fund. In order to fulfill this role, the

administrator of the Secondary Markets Fund must have accurate reports of recording sessions duly authorized and submitted under the Motion Picture Agreement.

“This Is It” Movie Soundtrack

12. Sony owns a sound recording of a duet sung by Michael Jackson and Paul Anka with piano accompaniment (hereinafter, “Jackson/Anka Demo”). The Jackson/Anka Demo was not recorded under the terms of the SRLA, and does not embody the performance of any musicians other than Jackson and Anka.

13. In September 2009, Sony called musicians represented by the AFM for a recording session under the aegis of the SRLA and then directed them to record instrumental tracks to enhance the Jackson/Anka Demo.

14. The product of the September 2009 session was given the title “This Is It,” and was incorporated into the theatrical motion picture *This Is It* released in October 2009. A related soundtrack record that includes “This Is It” was released contemporaneously with the film.

15. Sony called the recording session for “This Is It” for the intended and actual purpose of making a motion picture, a purpose that is prohibited by the clear terms of the SRLA. The AFM demanded that Sony execute a single project letter of acceptance to the AFM Motion Picture Agreement and correct the reports of the September 2009 session to reflect that it was a film recording session rather than a sound recording session, but Sony refused. As a result, the Film Musicians Secondary Markets Fund has been unable to collect residuals for distributions of the film, and musicians who rendered services have been denied residual compensation owed to them under prevailing standards in the motion picture industry.

B. Sony's New Use of Phonograph Records

16. The SRLA imposes payment obligations on Sony's use of sound recordings produced under the SRLA in other sound recordings and in other electronic media. If Sony uses a phonograph record produced under the SRLA in another phonograph record, Sony is required to pay to those musicians who rendered services in the recording of the phonograph record "an amount equal to all payments (including, without limitation, pension contributions, but excluding health and welfare contributions) that would be required under the Sound Recording Labor Agreement that would apply if the phonograph record so used were an original recording."

17. Similarly, if Sony uses a phonograph record produced under the SRLA for a purpose not covered by the SRLA, Sony is required to pay to those musicians who rendered services in the recording of the phonograph record "an amount equal to all payments (including, without limitation, pension contributions, but excluding health and welfare contributions) that would be required under the AFM agreement that would then be effective if the recording were originally made for the purpose set forth under that agreement." "A purpose not covered by the SRLA" includes such things as the making of theatrical and television motion pictures, live television videotapes, and commercial announcements. In connection with such "new use" of a phonograph record, Sony "must first provide the [AFM] with the identity of the records involved and the intended use of the product."

18. The use of digital sampling also gives rise to a new use payment obligation under these provisions of the SRLA. "Sampling" refers to the encoding of a portion of a phonograph record containing the performance of a musician into a digital sampler, computer, digital hard drive storage unit or any other device for subsequent play-back on a digital synthesizer or other play-back device.

19. If Sony “sells, assigns, leases, licenses or otherwise transfers title to or permission to use any phonograph record produced under any Sound Recording Labor Agreement since January 1954 for any purpose, [Sony] may obtain from such party an assumption agreement in the form set forth [in the SRLA]. Upon delivery [to the AFM] of such assumption agreement, the Company (or any subsequent party obtaining an assumption agreement) shall not be further liable to the Federation...for compliance with the terms of [the SRLA] with respect to the obligations assumed by the other party to the assumption agreement. In the event that no assumption agreement is delivered, [Sony] (or the party last obtaining an assumption agreement) shall continue to be liable for compliance with the terms of [the SRLA]...”

“Boogie Wonderland” New Use

20. Sony is the copyright owner of the 1979 sound recording of a song called “Boogie Wonderland” performed by the band Earth, Wind & Fire. “Boogie Wonderland” was originally produced under and is subject to the terms of the SRLA.

21. Sony licensed “Boogie Wonderland” for use in a theatrical motion picture released in August 2012 entitled *The Intouchables*. However, Sony did not first inform the AFM of this license, the identity of the record involved, or its intended use. The AFM did not learn of the use of “Boogie Wonderland” in *The Intouchables* until after the motion picture was released in August 2012.

22. Sony’s licensing of “Boogie Wonderland” for use in the theatrical motion picture *The Intouchables* constitutes the use of a phonograph record produced under the SRLA for a purpose not covered by the SRLA. Under the terms of the SRLA, Sony is obligated to pay those musicians who rendered services in the recording of “Boogie Wonderland” an amount equal to all payments (including, without limitation, pension contributions, but excluding health and

welfare contributions) that would be required under the AFM agreement that would then be effective if the recording were originally made for the purpose set forth under that agreement. If “Boogie Wonderland” were originally made for use in *The Intouchables*, the AFM agreement that would be effective for that purpose would be the AFM Motion Picture Agreement in effect in 2012.

23. Sony did not deliver to the AFM an assumption agreement indicating that any other party assumed the obligations of compliance with the terms of the SRLA in connection with the new use of “Boogie Wonderland.”

24. Sony has failed and, despite numerous demands, has refused to make the required new use payments to or on behalf of those musicians whose services were rendered in connection with the making of the sound recording “Boogie Wonderland,” in violation of the terms of the SRLA.

Tony Bennett: Duets II PBS New Use

25. Sony is the producer and copyright owner of seventeen sound recordings featuring duets by Tony Bennett and other vocal artists, which recordings were released in 2011 as an album entitled *Tony Bennett: Duets II*. All of the recordings comprising the album *Tony Bennett: Duets II* were produced under and are subject to the terms of the SRLA.

26. Sony licensed the use of each of the seventeen recordings comprising the album *Tony Bennett: Duets II* in a televised program broadcast in January 2012 by National Public Television.

27. Sony’s licensing of each of the seventeen recordings in a television broadcast constitutes the use of a phonograph record for a purpose not covered by the SRLA. Under the terms of the SRLA, Sony is obligated to pay to those musicians who rendered services in the

making of each recording an amount equal to all payments (including, without limitation, pension contributions, but excluding health and welfare contributions) that would be required under the AFM agreement that would then be effective if each of the recordings were originally made for the purpose set forth under that agreement. If the sound recordings comprising the album *Tony Bennett: Duets II* were originally made for the television broadcast by National Public Television, the AFM agreement that would be effective for that purpose would be the AFM National Public Television Agreement in effect in 2012.

28. Sony did not deliver to the AFM an assumption agreement indicating that any other party assumed the obligations of compliance with the terms of the SRLA in connection with the new use of the *Tony Bennett: Duet II* sound recordings.

29. Sony has failed and, despite numerous demands, has refused to make sixteen out of seventeen of the required new use payments to or on behalf of those musicians whose services were rendered in connection with the making of the sound recordings comprising the album *Tony Bennett: Duets II*, in violation of the terms of the SRLA.

“Bad” Overdubbing New Use

30. Sony is the producer and copyright owner of the sound recording entitled “Bad,” originally performed by Michael Jackson. “Bad” was produced under and is subject to the terms of the SRLA.

31. In 2012, Sony authorized the release of a new sound recording of “Bad” that includes additional vocal tracks performed by the artist known as Pitbull dubbed over the original tracks. However, Sony did not first inform the AFM of the new release of “Bad” or the intended use of the original recording. The AFM did not learn of the new use until after the re-release of “Bad” in or around August 2012.

32. Sony's licensing of the original recording of "Bad" for use in the overdubbed recording of "Bad" constitutes the use of a phonograph record in another phonograph record. Under the terms of the SRLA, Sony is obligated to pay to or on behalf of those musicians who rendered services in the making of the original sound recording of "Bad" an amount equal to all payments that would be required under the SRLA that would apply if the overdubbed reissue of "Bad" were an original sound recording. If the reissued recording of "Bad" were an original sound recording, the terms of the SRLA in effect in 2012 would apply.

33. Sony did not deliver to the AFM an assumption agreement indicating that any other party assumed the obligations of compliance with the terms of the SRLA in connection with the reissue of "Bad."

34. Sony has failed and, despite repeated demands, has refused to make the required new use payments to or on behalf of those musicians whose services were rendered in the making of the original sound recording of "Bad," in violation of the terms of the SRLA.

This Is It Sampling New Use

35. Sony is the producer and copyright owner of the sound recordings featuring Michael Jackson entitled "Billie Jean," "Man in the Mirror," "Wanna Be Startin' Something," and "The Way You Make Me Feel," all of which were produced under and are subject to the terms of the SRLA.

36. In September 2009, the AFM is informed and believes that Sony authorized the use of digitally sampled instrumental tracks taken from "Billie Jean," "Man in the Mirror," "Wanna Be Startin' Something," "The Way You Make Me Feel," and possibly other covered sound recordings (collectively, the "Jackson Recordings"), in the production of the theatrical motion picture *This Is It*. However, Sony has refused to respond to the AFM's request for

information regarding the extent of the use of digital sampling in *This Is It*, and has refused to make the sound technician(s) who sampled or mixed the tracks for the film available to the AFM in order to confirm the origin of the recordings used in the film.

37. Sony's use of digital samples taken from the Jackson Recordings in the theatrical motion picture *This Is It* constitutes the use of a phonograph record produced under the SRLA for a purpose not covered by the SRLA. Under the terms of the SRLA, Sony is obligated to pay those musicians who rendered services in the recording of the Jackson Recordings an amount equal to all payments (including, without limitation, pension contributions, but excluding health and welfare contributions) that would be required under the AFM agreement that would then be effective if the recordings were originally made for the purpose set forth under that agreement. If the Jackson Recordings were originally made for *This Is It*, the AFM agreement that would be effective for that purpose would be the AFM Motion Picture Agreement in effect in 2009.

38. Sony did not deliver to the AFM an assumption agreement indicating that any other party assumed the obligations of compliance with the terms of the SRLA in connection with the sampling new use of the Jackson Recordings in the film *This Is It*.

39. Sony has failed and, despite numerous demands, has refused to make the required new use payments to or on behalf of those musicians whose services were rendered in connection with the making of the original Jackson Recordings, in violation of the terms of the SRLA.

C. Sony's Use of Music Previously Recorded Under Another AFM Agreement

40. The SRLA also provides that "[w]hen music previously recorded under an American Federation of Musicians agreement other than any Sound Recording Labor Agreement is used in a phonograph record and such agreement requires payment for such use, the use

payments shall be the minimum session fee set forth in the Sound Recording Labor Agreement in effect at the time of such use.”

41. Furthermore, such transfer of rights in any recorded media product from one producer to another customarily is accompanied by a written license agreement and/or an assumption agreement that clearly identifies the party responsible for making all of the applicable talent union payments owed pursuant to the agreement under which the content was originally recorded. Typically, the licensee is the obligated party.

Whitney Houston Live: Her Greatest Performances CD/DVD Combination

42. In November 2014, Sony released a compact disc (“CD”) and/or CD and audiovisual digital versatile disc (“DVD”) combination set entitled *Whitney Houston Live: Her Greatest Performances*, which is comprised of recordings of various live televised performances featuring Whitney Houston accompanied by instrumental musicians represented by the AFM. These performances were previously recorded under and are covered by the AFM Television Videotape Agreement.

43. The AFM Television Videotape Agreement prohibits any dubbing of covered soundtrack for the purposes of producing phonograph records or similar devices, unless prior notice is given to the AFM and all musicians rendering performances in the soundtrack are compensated an amount equal to the scale for such new use and any and all additional payments applicable to such new use. Supplemental markets residuals are payable to the Film Musicians Secondary Markets Fund for distribution of covered performances in any audiovisual device designed for replay on a home-type television screen, such as a DVD.

44. Sony’s use of the Whitney Houston live television performances in the CD and DVD constitutes the use of music previously recorded under an AFM agreement other than the

SRLA in a phonograph record and similar device, and that other agreement provides for new use payments and supplemental markets payments for such uses.

45. Under the terms of the SRLA, Sony is required to pay to or on behalf of those musicians who rendered services in the Whitney Houston live television performances amounts equal to the SRLA scale.

46. Furthermore, the AFM is informed and believes, and on that basis alleges, that Sony obtained valid licenses from the television producers or copyright owners of each of the Whitney Houston live performance recordings covering their use in the CD/DVD combination. The AFM further believes and alleges that those license agreements obligate Sony to pay the musicians all other payments due under the Television Videotape Agreement, including new use and supplemental markets residuals, in connection with this project.

47. Sony has failed and, despite numerous demands, has refused to make any new use or supplemental markets payments to or on behalf of those musicians whose services were rendered and recorded in connection with the live performances with Whitney Houston, in violation of the SRLA and Sony's other legal obligations.

CAUSES OF ACTION

First Claim for Relief

Breach of Contract – Misuse of SRLA for a Prohibited Purpose

48. The allegations contained in Paragraphs 1 through 47 above are reasserted and incorporated here by reference as if fully restated.

49. In September 2009, Sony called a recording session under the terms of the SRLA for the purpose of creating musical underscore for the theatrical motion picture *This Is It*, a purpose that is not permitted under the terms of the SRLA.

50. Sony has failed and refused to properly report the September 2009 session as a film recording session, and has failed and refused to pay the appropriate residual compensation to the Film Musicians Secondary Markets Fund on behalf of the musicians engaged for the session.

51. Sony's conduct as described in Paragraphs 48 through 50 violated the terms of the SRLA, causing economic losses to musicians represented by the AFM.

Second Claim for Relief
Breach of Contract - "Boogie Wonderland" New Use

52. The allegations contained in Paragraphs 1 through 47 above are reasserted and incorporated herein by reference as if fully restated.

53. "Boogie Wonderland" is a sound recording owned by Sony embodying the performances of musicians whose services were covered by the SRLA.

54. Sony licensed "Boogie Wonderland" for new use in the theatrical motion picture *The Intouchables*, giving rise to an obligation to pay to or on behalf of those musicians who rendered services in the making of the recording an amount equal to all payments that would be required under the terms of the AFM Basic Theatrical Motion Picture Agreement that were then in effect.

55. Sony failed to report the new use of "Boogie Wonderland" to the AFM and has failed to pay the amounts due to the musicians as required by the SRLA.

56. Sony's conduct as described in Paragraphs 52 through 55 violated the terms of the SRLA, causing economic losses to musicians represented by the AFM.

Third Claim for Relief
Breach of Contract - *Tony Bennett: Duets II* PBS New Use

57. The allegations contained in Paragraphs 1 through 47 above are reasserted and incorporated herein by reference as if fully restated.

58. The album *Tony Bennett: Duets II* is comprised of seventeen Sony sound recordings produced under and covered by the SRLA.

59. Sony licensed the seventeen recordings comprising *Tony Bennett: Duets II* for new use in a television program broadcast by National Public Television, giving rise to an obligation to pay to or on behalf of those musicians who rendered services in the making of each of the recordings an amount equal to all payments that would be required under the terms of the AFM National Public Television Agreement that were then in effect.

60. Sony has failed to pay all the amounts due to the musicians as required by the SRLA.

61. Sony's conduct as described in Paragraphs 57 through 60 violated the terms of the SRLA, causing economic losses to musicians represented by the AFM.

Fourth Claim for Relief
Breach of Contract - "Bad" Overdubbing New Use

62. The allegations contained in Paragraphs 1 through 47 above are reasserted and incorporated herein by reference as if fully restated.

63. Sony's sound recording of the song "Bad" as performed by Michael Jackson incorporates the performances of musicians whose services were covered by the SRLA.

64. Sony authorized the use of the original recording of "Bad" in a new phonograph record, giving rise to an obligation to pay to or on behalf of those musicians who rendered

services in the making of the recording an amount equal to all payments that would be required under the terms of the SRLA that were then in effect.

65. Sony has failed to pay the amounts due to the musicians as required by the SRLA.

66. Sony's conduct as described in Paragraphs 62 through 65 violated the terms of the SRLA, causing economic losses to musicians represented by the AFM.

Fifth Claim for Relief
Breach of Contract – *This Is It* Sampling New Use

67. The allegations contained in Paragraphs 1 through 47 above are reasserted and incorporated herein by reference as if fully restated.

68. Sony's sound recordings of "Billie Jean," "Man in the Mirror," "Wanna Be Startin' Something," and "The Way You Make Me Feel" embody the performances of musicians whose services were covered by the SRLA.

69. The AFM is informed and believes that Sony sampled instrumental tracks from these recordings, and possibly others, for new use in the theatrical motion picture *This Is It*, giving rise to an obligation to pay to or on behalf of those musicians who rendered services in the making of the recordings an amount equal to all payments that would be required under the terms of the AFM Basic Theatrical Motion Picture Agreement that were then in effect.

70. Sony has refused to provide information to the AFM regarding its sampling of tracks for use in *This Is It* and has failed to pay the amounts due to the musicians as required by the SRLA.

71. Sony's conduct as described in Paragraphs 67 through 70 violated the terms of the SRLA, causing economic losses to musicians represented by the AFM.

Sixth Claim for Relief
Breach of Contract - *Whitney Houston Live* Use of Music Previously Recorded

72. The allegations contained in Paragraphs 1 through 47 above are reasserted and incorporated herein by reference as if fully restated.

73. Sony released live performances of musicians previously recorded under the AFM Television Videotape Agreement as a CD and DVD set entitled *Whitney Houston Live: Her Greatest Performances*, for which Sony is obligated to pay to or on behalf of those musicians who rendered services in the live performances new use payments and supplemental markets residuals.

74. Sony has failed to pay the amounts due under the SRLA and the Television Videotape Agreement for its release of the *Whitney Houston Live* CD and DVD.

75. Sony's conduct as described in Paragraphs 72 through 74 violated the terms of the SRLA and Sony's other legal obligations, causing economic losses to musicians represented by the AFM.

REQUEST FOR RELIEF

WHEREFORE, the Plaintiff AFM respectfully requests that this Court:

- (a) enter an award of damages in favor of the Plaintiff AFM and the musicians it represents for all economic injuries, including prejudgment interest, incurred as a result of Defendant Sony's contractual violations as alleged in this Complaint;
- (b) award the Plaintiff AFM all costs to which it is entitled; and
- (c) grant such other and further relief as this Court may deem just and equitable.

JURY DEMAND

The Plaintiff AFM demands a trial by jury on all the issues so triable.

Dated: New York, New York
July 7, 2015

Respectfully submitted,

/s/ Jennifer Patrice Garner

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