

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BMG RIGHTS MANAGEMENT (US), LLC,
PRIMARY WAVE MUSIC PUBLISHING
LLC, NICHOLAS MATTHEW BALDING,
ROBERT CLIFTON BRACKINS III, JON
REDWINE, AND NOTTING DALE SONGS,
INC.,

Case No.

COMPLAINT

Plaintiffs,

v.

ATLANTIC RECORDING CORPORATION,
WEA, INC., DIJON MCFARLANE p/k/a
“DJ MUSTARD”, OMARI GRANDBERRY
p/k/a “OMARION”, SONGS MUSIC
PUBLISHING, LLC, and UNIVERSAL
MUSIC-MGB NA, LLC,

Defendants.

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Plaintiffs, BMG RIGHTS MANAGEMENT (US), LLC, PRIMARY WAVE MUSIC PUBLISHING LLC., NICHOLAS MATTHEW BALDING, ROBERT CLIFTON BRACKINS III, JON REDWINE, and NOTTING DALE SONGS, INC. (collectively referred to hereafter as “Plaintiffs”), by their attorneys, Motta & Krents, as and for their Complaint against the defendants, ATLANTIC RECORDING CORPORATION, WEA, INC., DIJON MCFARLANE p/k/a “DJ MUSTARD”, OMARI GRANDBERRY p/k/a “OMARION”, SONGS MUSIC PUBLISHING, LLC., and UNIVERSAL MUSIC-MGB NA, LLC (collectively referred to hereafter as “Defendants”), allege the following:

THE PARTIES

1. Plaintiff, BMG Rights Management (US), LLC (“BMG”), is a limited liability company duly formed and existing under the laws of the State of Delaware with offices in New York, New York and Los Angeles, California.

2. Plaintiff, Primary Wave Music Publishing, LLC, d/b/a Primary Wave Beats (BMI) (“Primary Wave”), is a limited liability company duly formed and existing under the laws of the State of New York with offices in New York, New York and Los Angeles, California.

3. Plaintiff, Nicholas Matthew Balding d/b/a Dad’s National Publishing (BMI) (“Balding”), is an individual residing in the State of California.

4. Plaintiff, Robert Clifton Brackins, III d/b/a Settled Publishing (BMI) (“Brackins”), is an individual residing in the State of California.

5. Plaintiff, Jon Redwine d/b/a Red Soundscapes (BMI) (“Redwine”), is an individual residing in the State of California.

6. Plaintiff, Notting Dale Songs, Inc. (“Notting Dale”), is a corporation duly formed and existing under the laws of the State of California with its principal place of business in Los Angeles, California.

7. Upon information and belief, defendant, Atlantic Recording Corporation (“Atlantic”), is a Delaware corporation authorized to do business in the States of New York and California, with offices in New York, New York and Los Angeles, California.

8. Upon information and belief, defendant, WEA, Inc. (“WEA”), is a Delaware corporation authorized to do business in the States of New York and California, with offices in New York, New York and Los Angeles, California.

9. Upon information and belief, defendant Dijon McFarlane p/k/a “DJ Mustard” (“DJ Mustard”), resides in the State of California.

10. Upon information and belief, Defendant, Omari Grandberry p/k/a “Omarion” (“Omarion”), resides in the State of California.

11. Upon information and belief, defendant, Songs Music Publishing, LLC (“Song”), is a limited liability company organized under the laws of the State of Delaware, with offices in New York, New York.

12. Upon information and belief, defendant, MGB NA, LLC d/b/a Universal Music Publishing (“Universal Music Publishing”), is a limited liability company organized under the laws of the State of California, authorized to do business in the States of New York and California, with offices in New York, New York and Santa Monica, California.

JURISDICTION

13. This court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §§1331 and 1338(a) as this is an action brought under the Copyright Act and the Copyright Revision Act, 17 U.S.C. §§101, et seq. This court has jurisdiction of Plaintiffs’ claim seeking declaratory judgment pursuant to 28 U.S.C. § 1367(a).

VENUE

14. Venue of this case is proper in this district pursuant to 28 U.S.C. §§1391(b)(1) and (2) and 1400(a).

BACKGROUND

15. On or about June 3, 2014 the musical composition, “Came To Do” co-written by Joseph Bereal (“Bereal”), Balding, Brackins, and Redwine was completed (the “Infringed Composition”). The Infringed Composition was recorded approximately one month thereafter and on or about September 12, 2014 was embodied on the Chris Brown album, *X*, released and distributed by RCA Records, a division of Sony Music Entertainment. *X* premiered at #2 on the Billboard Top 200 Chart and was certified platinum by the Recording Industry Association of

America.

16. On or about November 11, 2013, Redwine entered into an exclusive Co-Publishing and Administration Agreement with BMG and Primary Wave (the “Redwine Co-Publishing Agreement”), in which he, in part, assigned to BMG and Primary Wave fifty (50%) percent of his interest in the copyrights of all existing and future compositions in which he was writer or had an interest, including the Infringed Composition, and the exclusive right to administer one hundred percent (100%) of his interest in such copyrights.

17. On or about May 26, 2010, Brackins entered into an exclusive Co-Publishing and Administration Agreement with Primary Wave (the “Brackins Co-Publishing Agreement”), in which he, in part, assigned to Primary Wave fifty (50%) percent of his interest in the copyrights of all existing and future compositions in which he was writer or had an interest, including the Infringed Composition, and the exclusive right to administer one hundred percent (100%) of his interest in such copyrights.

18. Notting Dale Publishing, Inc. is the publishing company of Joseph Bereal to which Bereal has assigned his interest in the copyrights of all existing and future compositions in which he was writer or had an interest, including the Infringed Composition.

19. On or about September 1, 2013, BMG and Primary Wave entered into a Joint Venture Publishing Agreement, subsequently modified in or about February 11, 2014, providing that the Brackins Co-Publishing Agreement would be deemed a “New Writer Agreement” under the Agreement with the result that that BMG and Primary Wave would jointly and equally own the copyright interests in all musical compositions subject to the Brackins Co-Publishing Agreement.

20. On or about July 9, 2015, BMG registered the Plaintiffs' copyright interests in the Infringed Composition with the U.S. Copyright Office, under the registration number PA0001949837. (A true and correct copy of the Certificate of Registration for the Infringed Composition (the "Certificate") is attached as Exhibit A).

21. Upon information and belief, Mustard is a Hip-Hop and R&B music producer who works primarily with established Hip-Hop and R&B artists, including Omarion.

22. Upon information and belief, Omarion is a successful recording artist, songwriter, and actor, who has released the following four solo studio albums to date: (1) *O*, released in 2005 and which debuted at #1 on the Billboard Top 200 Chart and the Billboard Top R&B/Hip-Hop Album Chart; (2) *21*, released in 2006, featuring the hit single "Ice Box" which reached the top 20 on the Billboard Hot 100 Chart; and (3) *Ollusion*, released in 2010, embodying the first single "I Got It In".

23. Upon information and belief, Atlantic is a U.S. record label for some of the most well-known musical artists in Hip-Hop and R&B genres, including, in no particular order Omarion, B.o.B, Flo Rida, Bruno Mars, TI, Lil Uzi Vert, Trey Songz, Wale and many more.

24. Upon information and belief, Atlantic was and is involved in the marketing, manufacture and distribution of sound recordings embodying the musical performances of recording artists.

25. Upon information and belief, WEA distributes prerecorded music and audiovisual works, via both physical and digital distribution, including distribution over the Internet, via a number of digital music retailers and music services including, but not limited to iTunes, Amazon.com, and Spotify.

26. On or about December 2, 2014 Omarion's fourth studio album, *Sex Playlist* (the "Album"), was released in North America, and broke into the top 20 on the *Billboard* Hot 200 Chart and the top 5 of the *Billboard* Top R&B/Hip-Hop Albums. The Album had embodied thereon the top 20 *Billboard* Hot 100 hit (certified platinum by the RIAA): "Post To Be" (the "Infringing Composition"). The sound recording of the Infringing Composition was released as a "single" prior thereto, on or about November 11, 2014.

27. Omarion is the performer and a listed writer of the Infringing Composition.

28. Mustard is the producer of the sound recording of the Infringing Composition and is listed as a writer of the Infringing Composition.

29. Upon information and belief, Atlantic was the record label that released the Album, including the Infringing Composition, marketed and manufactured the Album, and authorized WEA to distribute the Album, including the Infringing Composition.

30. The Infringing Composition is a musical composition embodied upon a sound recording that is included as a track on the Album, and as a disaggregated digital commercial single distributed and sold separate and apart from the Album.

31. Original musical elements present in the Infringing Composition were copied from the Infringed Composition creating an unauthorized derivative work, and further, the combination of similarities are substantial with all the similarities being original to the Infringed Composition.

32. The Infringed Composition and the Infringing Composition were both written in minor keys, with the Infringed Composition having been recorded in C minor and the Infringing Composition having been recorded in D-flat minor. As well, the melodies of the title and hook

lyrics in the Infringed Composition and the Infringing Composition, namely, “Came To Do” and “Post To Be” are identical in pitches, intervals, rhythmic durations and beat placement, and heard within a larger melodic phrase with additional similarities.

33. The Infringed Composition was used as a compositional template for the Infringing Composition, including the first sixteen measures present in both works. Many similarities are present, further proving that the Infringing Composition copied the Infringed Composition, thereby creating an unauthorized derivative work. Some of the similarities are as follows:

(a) The two-measured synthesized bass line is the main instrumental feature in the opening four measures of both the Infringed Composition and the Infringing Composition, inclusive of similar syncopated rhythms.

(b) The pre-chorus parts of both the Infringing Composition and the Infringed Composition (inclusive of substantially similar vocal melodies) are introduced at precisely measure five commencing ten (10) seconds into both the Infringed Composition and the Infringing Composition.

(c) Claps or snaps are introduced in the backbeats at precisely measure five in the Infringed Composition and the Infringing Composition.

(d) “Oh” and “oo” backing vocals commence exactly on the pickup at 0:29 to measure thirteen in both the Infringed Composition and the Infringing Composition, which is the first measure of Chorus One in the Infringed Composition and the Infringing Composition.

(e) Chanted (or whispered) background vocals on off-beats are introduced at precisely measure thirteen which, as previously noted, is the first measure of Chorus one in the Infringed

Composition and the Infringing Composition.

(e) A more complex drum pattern is introduced in measure thirteen which is the first measure of Chorus one in the Infringed Composition and the Infringing Composition.

(f) The corresponding measures in the Infringed Composition and the Infringing Composition is the first measure after the four (4) measure introductory section, featuring bass but not drums in both the Infringed Composition and the Infringing Composition.

(g) The tempo of the Infringed Composition is at 98 beats per minute (“BPM”) and the tempo of the Infringing Composition is 97.6 BPM.

34. Upon information and belief, Songs is a music publishing company that represents the copyrights of musical compositions and songwriters and, at all times herein, has co-published and co-administered the alleged interest of writer(s) to the Infringing Composition.

35. Upon information and belief, Universal Music Publishing is a music publishing company that represents the copyrights of musical compositions and songwriters and, at all times herein, has co-published and co-administered the alleged interest of writer(s) to the Infringing Composition.

FIRST CLAIM AGAINST ATLANTIC, WEA, SONGS, UNIVERSAL MUSIC PUBLISHING, DJ MUSTARD AND OMARION FOR COPYRIGHT INFRINGEMENT

36. Plaintiffs repeat the allegations set forth in paragraph 1 through 35.

37. This is an action for damages and declaratory judgment and is brought by Plaintiffs pursuant to the Copyright Act and Copyright Revision Act, 17 U.S.C. §§101, et seq. and 28 U.S.C. §§2201 (a).

38. Plaintiffs have complied with all laws pertinent to the Infringed Composition as a copyrighted work.

39. Atlantic, WEA, Songs, Universal Music Publishing, DJ Mustard, and Omarion have all infringed upon the Infringed Composition in a number of ways including the following: (1) creating a derivative work by including the Infringed Composition in the Infringing Composition; (2) through the manufacture, distribution and sale, and/or the authorizing of others to distribute and sell the Infringing Composition; (3) authorizing and/or licensing the Infringing Composition including for digital downloads; (4) commercially exploiting the Infringing Composition; (5) performing or authorizing the performance of the Infringing Composition; and/or (6) causing and/or materially contributing to and/or by substantially participating in and furthering the above-mentioned infringing acts, and/or sharing the proceeds therefrom, all through unlicensed sales of the Infringing Composition.

40. Upon information and belief, Atlantic, WEA, Songs, Universal Music Publishing, DJ Mustard, and Omarion had the obligation, right and ability to supervise each infringing activity but allowed the infringement to occur, and they had an obvious and direct financial interest in exploiting the copyrighted Infringed Composition.

41. Accordingly, Atlantic, WEA, Songs, Universal Music Publishing, DJ Mustard, and Omarion are liable for direct, contributory, and vicarious copyright infringement of the Infringed Composition.

42. Upon information and belief, Atlantic, WEA, Songs, Universal Music Publishing, DJ Mustard, and Omarion have and continue to receive payments for the unlicensed sale of the Infringing Composition.

43. Upon information and belief, Atlantic, WEA, Songs, Universal Music Publishing, DJ Mustard, and Omarion have received payments for the unlicensed sale of the Infringed

Composition without accounting for and remitting the appropriate amount of such royalties to BMG or providing for the appropriate copyright interest of Plaintiffs in the Infringing Composition.

44. Upon information and belief, Atlantic, WEA, Songs, Universal Music Publishing, DJ Mustard, and Omarion have received royalties for the licensing of the Infringed Composition for digital downloads and streaming via the Internet.

45. By reason of the infringement of the Infringed Composition, and the continuous infringement of the Infringed Composition, Plaintiffs have sustained and will continue to sustain substantial injury, loss and damage to their rights in the Infringed Composition.

46. Further irreparable harm to Plaintiffs is imminent as a result of Defendants' conduct, and Plaintiffs are without adequate remedy at law. Plaintiffs are entitled to an injunction restraining Defendants, their officers, directors, agents, employees and representatives and all persons acting in concert with them from engaging in further acts of copyright infringement.

47. Plaintiffs are further entitled to recover from Defendants the damages sustained by Plaintiffs as a result of Defendants' acts of copyright infringement. Plaintiffs are at present unable to ascertain the full extent of the monetary damage Plaintiffs have suffered by reason of Defendants' acts of copyright infringement but believe such damages exceed \$150,000.00.

48. Plaintiffs are further entitled to recover from Defendants the gains, profits and advantages they obtained as a result of their acts of copyright infringement. Plaintiffs are at present unable to ascertain the full extent of the gains, profits, and advantages Defendants have obtained by reason of their acts of copyright infringement, but Plaintiffs are informed and believe that Defendants have obtained such gains, profits, and advantages in an amount

exceeding \$150,000.00.

SECOND CLAIM AGAINST DJ MUSTARD, SONGS, OMARION AND UNIVERSAL MUSIC PUBLISHING FOR DECLARATORY JUDGMENT AS TO THE INTEREST OF THE PLAINTIFFS IN THE INFRINGING COMPOSITION

49. Plaintiffs repeat the allegations set forth in paragraph 1 through 48.

50. A sample-publishing license to use the Infringed Composition within the Infringing Composition was never requested from any of the Plaintiffs by Atlantic, Songs or Universal Music Publishing. Accordingly, there is no sample-publishing license in place permitting any of the Defendants to exploit the Infringed Composition. Nonetheless, the Infringed Composition was incorporated in the Infringing Composition embodied upon the Album, and as a disaggregated digital single distributed and sold separate and apart from the Album, when it was released on December 2, 2014.

51. Songs and Universal Music Publishing have failed to recognize and acknowledge the substantial interest of the Plaintiffs in the copyright of the Infringing Composition, and have taken the position that the Plaintiffs are not entitled to any portion of the mechanical and publishing royalties derived from the Infringing Composition.

52. The Infringing Composition is a derivative work of the Infringed Composition containing a portion of the Infringed Composition co-written by Brackins, Redwine, Balding, and Bereal and in which plaintiffs hold a copyright interest.

53. Atlantic was the label that released the album and the disaggregated digital single, and is responsible for the payment of mechanical and publishing royalties for the Infringing Composition.

54. Upon information and belief, Songs and Universal Music Publishing have

licensed portions of the Composition of the Infringing Composition to Atlantic.

55. In the absence of a sample publishing license issued by any owner of the copyright in the Infringed Composition, a declaratory judgment is necessary to determine the rights of the Plaintiffs in the copyright of the Infringing Composition, and the amount of mechanical and publishing royalties due Plaintiffs for the sale of physical and digital albums, including digital download royalties of whole albums/ “singles”/digital Track Equivalent Albums, and ringtone/ringback royalties, based on such ownership.

WHEREFORE, Plaintiffs demand judgment as follows:

- a) That Defendants be found liable for direct, contributory, and/or vicarious copyright infringement.
- b) That Defendants be ordered to submit to an accounting so that all gains, sales, profits, and advantages derived by Defendants from each of their acts may be determined.
- c) For a preliminary and permanent injunction enjoining Defendants and all persons acting in concert with them from copying, reproducing, performing, manufacturing, promoting, advertising, and distributing the Infringed Composition, or performing any materials that are substantially similar to the Infringed Composition, and to deliver to the Court for destruction or other reasonable disposition, all such material and means for producing same, in Defendants’ possession or control.
- d) For actual damages and Defendants’ profits in an amount to be determined at trial, not less than \$300,000.00.
- e) For declaratory judgment that Plaintiffs own a copyright interest in the Infringed Composition, and are entitled to publishing royalties and royalties from the sale of physical and

digital albums, including digital download royalties and ringtone/ringback royalties, based on such ownership or, in the alternative, that the Court declare Plaintiffs' ownership interest in the Infringing Composition and sound recordings of such works, and order appropriate payment based upon such ownership interest.

f) For Plaintiffs' reasonable attorney's fees, interest, costs, and disbursements and for such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 16, 2016

____s/_____
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