To Be Argued By:
Ryan E. Long

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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

CHRISETTE MICHELE PAYNE,

Plaintiff-Appellant,

against

DOUGLAS ELLISON and FOUR KINGS PRODUCTIONS, INC.,

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT CHRISETTE MICHELE PAYNE

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I. Nature of appeal.

Chrisette Michele Payne (hereinafter "Appellant") appeals from two Orders issued by the Hon. Michael D. Stallman of the Supreme Court of the State of New York, County of New York ("Court"). The first is dated April 5, 2009 and was entered on April 14, 2009 ("April Order"), and the second is dated August 18, 2009 and was entered on August 21, 2009 ("August Order"). The April Order dismissed all of Appellant's breach of contract claims, save one, and all of Appellant's non-breach of contract claims, save one. The August Order denied Appellant's motion to renew and reargue the claims dismissed by the April Order, and failed to grant Appellant's motion to amend or supplement her pleading.

II. Questions presented.

A. The April Order.

Whether the Court erred when it dismissed Appellant's:

(1) Breach of contract claims without first considering and taking into account the meaning of the undefined technical industry terms of art used throughout the contracts via extrinsic objective evidence, in the form of copyright and music publishing treatises, that Appellant provided;

(2) Fraudulent inducement and negligent misrepresentation claims even though Appellant alleged, and provided circumstantial evidence that, Respondent Douglas Ellison ("Respondent Ellison") either harbored a preconceived but

undisclosed intention of not performing his fiduciary duties, or negligently misrepresented his capacity to properly carry out these duties;

(3) Unjust enrichment and conversion claims as redundant with Appellant's breach of contract claims even though Respondent Ellison was unjustly enriched, and converted monies, as Appellant's fiduciary, irrespective of the existence of a oral or written contract between the parties; and

(4) Breach of fiduciary claim merely because one of the parties' contracts did not contain a provision creating such a duty between the parties.

B. The August Order.

Whether the Court erred in denying Appellant's motion to renew and reargue, and to amend, by:

(1) Finding that the testimony that Appellant submitted for the first time to the Court did not present new facts, but only legal conclusions, merely because the affiants were third party attorneys;

(2) Failing to find that Appellant provided reasonable justification for not previously providing the testimony in opposition to the motion to dismiss filed by Respondents merely because the testimony was available;

(3) Refusing to consider the affiants' testimony even though it warranted a change to the April Order; and

(4) Failing to grant Appellant's motion to amend her pleading even though her proposed amendments had merit.

III. Preliminary statement.

A. The April Order Should Be Reversed.

First, the Court erred in dismissing Appellant's breach of contract claims. Appellant is a singer and songwriter. In early 2005, she entered into several highly technical music industry contracts with Respondents. In her complaint, Appellant alleges that Respondents breached several of these agreements. Among other things, Respondents took fifty-percent (50%), and likely more, of monies, otherwise known as "advances," that were paid to Appellant and Respondent under their contract with EMI April Music, Inc. ("EMI"). Respondents also took fifty-percent (50%), and likely more, of an advance that was payable solely to Appellant in accordance with her contract with SESAC, Inc. ("SESAC"). Appellant maintains that Respondents were not entitled to fifty-percent (50%) of either advance. Instead, she claims that Respondents were only entitled to twenty-five percent (25%) of the EMI advance, and to twenty-percent (20%) of the SESAC advance.

The Court dismissed Appellant's claims. In its April Order, the Court held that one of the parties' agreements, the Exclusive Recording Agreement ("Recording Agreement"), entitled Respondents to fifty—percent (50%) of these advances. Under the agreement, Respondents, as Appellant's record company, were entitled to make and sell up to seven (7) of Appellant's albums. Respondents are also entitled to fifty-percent (50%) of "net advances," which are monies awarded by a third party record company "authorized to distribute recordings" embodying Appellant's "Masters." Even though the agreement does not define "authorized to distribute recordings" or "Masters," the Court refused to consider Appellant's evidence, which consisted of music and copyright treatises, which would have familiarized the Court with these terms. Instead, the Court found the Recording Agreement "clear" on its face and that its undefined terms were "not pertinent to the issues at hand." In the Court's view, it did not need "technical expertise" to resolve the parties' dispute over their respective rights to the EMI and SESAC advances.

In so doing, the Court erred. Appellant's evidence showed that the Recording Agreement's "net advance" provision did not apply to the EMI advance because EMI is not a record company "authorized to distribute recordings embodying" Appellant's "Masters." A "master" refers to the recording of an artist's performance of a song, or "composition." In the music industry, masters and compositions generate two separate revenue, or royalty, streams. For example, the singer-songwriter professionally known as Mr. Bob Dylan wrote the lyrics and notes for "All Along The Watch Tower." He also recorded his performance of the song, too. Mr. Dylan will receive record royalties from the sale of his recording of the song, or master, on compact disc, vinyl, and other mediums. Other artists have also performed and recorded their own versions, known as "covers," of Mr. Dylan's song. These artists include Jimmy Hendrix, U2, and The Dave Matthews Band. In addition to his record royalties, Mr. Dylan will also be entitled to receive payment from these artists who sell or manufacture their covers of "All Along The Watch Tower." This payment is called a "mechanical royalty." Here, EMI was only authorized under its agreement with the parties to collect mechanical royalties, and other composition related royalties, on behalf of the parties.

As a result, the Court should have used the Co-Publishing Agreement to determine the parties' rights to the EMI advances. Only the Co-Publishing Agreement determines the parties' rights to mechanical royalties. EMI reimburses itself for the monies it advanced the parties, or recoups it, from the parties' share of these royalties. Under the parties' Co-Publishing Agreement, Appellant and Respondents are equal owners of the copyright to Appellant's compositions, and are thus considered "co-publishers" in the music industry. As co-publishers, the parties split half (50%) of the mechanical royalties equally, 25% for Appellant and 25% for Respondents. This half of composition income split by publishers is referred to the in music industry as the "publisher's share." But as writer of the compositions, Appellant is entitled to the other half (50%) of the composition income. In the music industry, this half paid to the writer is referred to as the "writer's share." Because the Co-Publishing Agreement entitled Appellant to seventy-five percent (75%) of mechanical royalties, she was entitled to the same percentage of the EMI advances. Even assuming, for the purpose of discussion, that EMI recoups its advances only from another royalty stream, such as "synchronization royalties," which are monies paid by a third party to use the compositions with movies or images, Respondents would still not be entitled to fifty-percent (50%) of the EMI advances.

However, the Court should have only used the parties' Management Agreement to determine the parties' share of the SESAC advance. The Recording Agreement did not apply to this advance. Under its separate agreements with the parties, SESAC only obtained the right to collect monies from third parties, such as nightclubs, radio stations, and other artists, who publicly perform Appellant's compositions. In the music industry, these monies are referred to as "public performance royalties." As such, SESAC did not obtain the right to distribute Appellant's masters. The Co-Publishing Agreement did not apply to the SESAC advances, either. The SESAC advance was made according to an agreement that Appellant had with SESAC, and was solely recoupable by SESAC from Appellant's writer’s share of public performance royalties. The parties’ Co-Publishing Agreement explicitly states that Appellant has the right to receive these royalties “directly from” the “performing rights society” that collects them on her behalf, which is SESAC. Because Respondents had no right to these royalties under the Co-Publishing Agreement, they were entitled to twenty-percent (20%) of the SESAC advances under the Management Agreement. Respondent's former transactional attorney, Matthew Middleton, Esq., admits as much in a letter.

Second, the Court erred when it dismissed Appellant’s fraudulent inducement and negligent misrepresentation claims. The Court found that Appellant merely alleged that Respondent Ellison “did not intend to meet” his “contractual obligations,” and that his words were nothing more than “puffery.” The Court erred in so finding because when Respondent Ellison promised he would “take care of” Appellant in 2001, there was a principal-agent relationship between them. As such, Defendant Ellison was acting as a fiduciary when he made the statement even though there was no formal management agreement between the parties. There is strong circumstantial evidence that Respondent Ellison had an undisclosed intention of not fulfilling, or at least negligently misrepresented his capability to properly carry out, his duties to Appellant. For example, after the parties formally executed their Management Agreement in early 2005, Respondent Ellison allowed Mr.

Middleton to keep $50,000.00 of an EMI advance in late 2005 to pay for his legal fees. This taking was improper even assuming, for argument's sake, that Respondents were entitled to fifty-percent (50%) of this advance.

Third, the Court erred when it dismissed Appellant's unjust enrichment and conversion claims. The Court found that these claims were barred by the existence of a "valid contract." However, Respondent Ellison was unjustly enriched, and converted monies, as Appellant's fiduciary, irrespective of a "valid contract" between them.

Finally, the Court erred in dismissing Appellant's breach of fiduciary duty claim. The basis for the dismissal was that the parties' Recording Agreement did not specifically include a clause providing that Respondent Ellison owed Appellant such a duty. However, Respondent Ellison owed Appellant a fiduciary duty because of the principal-agent relationship created between them in or about 2001. Therefore, Respondent Ellison owed Appellant a fiduciary duty "throughout the relationship," including his dealings in connection with the Recording Agreement.

These arguments are fleshed out in Section V(B) below.

B. The August Order Should Be Reversed.

First, the Court erred in finding that the third party affirmations and affidavit, all of which Appellant provided for the first time in connection with her motion, did not present facts, but only legal conclusions. The expert affiant's factual testimony concerned the custom and usage of the undefined technical music industry terms in the parties' agreements. The remaining affirmation and affidavit are from executives at EMI and SESAC. Among other things, the EMI executive testifies to the amount of royalties that EMI is keeping from the parties until EMI reimburses itself for their advances, and the SESAC executive testifies that the SESAC advance is being reimbursed solely from Appellant's writer's share of public performance royalties.

Second, the Court erred in finding that Appellant did not provide reasonable justification for not previously submitting the testimony. New York case law clearly shows that while it would have been appropriate to submit this testimony in opposition to a motion for summary judgment, it would have been inappropriate to do so in opposition to a motion to dismiss.

Third, the Court erred in refusing to consider the merits of the testimony. "Substantive fairness" required the Court to consider the testimony because it warranted a change to the April Order's findings in numerous respects. For example, to justify its application of the "net advance" provision of the parties' Recording Agreement to the advances from EMI, the April Order found that the parties' agreement with EMI is a "recording contract." However, Appellant's evidence and testimony shows that the agreement is not a "recording contract," but a co-publishing and administration agreement. When a songwriter enters into such an agreement with a publisher, the songwriter and publisher become co-publishers of, and co-owners of the copyright to, the compositions written by the songwriter, not the songwriter's recordings. In so doing, the co-publishers share a limited financial interest the publisher's share of royalties generated from the compositions, not the songwriter's recordings. Consequently, this testimony warrants a modification to the Court's April Order because EMI is not authorized to distribute Appellant's masters.

Lastly, the Court erred in denying Appellant's motion to amend or supplement her Complaint. Her proposed supplementations had merit. For instance, Appellant discovered that Respondents took more than fifty-percent (50%) of the EMI and SESAC advances. Even under the April Order, the parties' contracts don't authorize such a taking.

These arguments are developed in Section V(C) below.

IV. Statement of facts.

A. The Parties.

"I'll take care of you." Appendix at 57 ("A - 57"). Respondent Ellison told this to Appellant a few months after they met in 2001. *Id.* At the time, Appellant was twenty-one (21) years old and a student at the arts oriented Five Towns College in Long Island. *Id.* Respondent Ellison proposed marriage to Appellant, offered her a wedding ring, bought her expensive gifts, including a fur coat, and also told her things such as "I'll make you into a big star." *Id.* Respondent further represented that he had millions of dollars and that he would help Appellant with her career. *Id.*

Accordingly, in a letter to Respondent Ellison dated July 5, 2002, Appellant states: "I think that we should be open and honest. My goal is to complete that before my *signature*," A - 341, and that she was "finally willing to believe in" Respondent Ellison. *Id.* (emphasis added). In a April 15, 2004 letter, Appellant tells Respondent: "I tried to figure out how to talk to you and what the difference between you and *other managers* were and why feelings didn't get in the way and it was because they were older and there was no attraction. I can't treat you like I treated them...*before all of this you loved me and called you your everything*, or at least wanted to." A - 343 (emphasis added).

B. The Contracts.

Appellant entered into two music industry contracts with Respondents on January 31, 2005. The first was the exclusive artist Management Agreement with Respondent Four Kings d/b/a "Four Kings Management." A - 69. The second was the Recording Agreement, which includes the Co-Publishing Agreement and a Merchandising Agreement as Exhibits "A" and "B," respectively. *See* A - 84 and 88, respectively.

The parties use the following undefined terms throughout their agreements: "music recording" and "music publishing," A - 73, ¶11(b)(1); "recording," "distribution agreement," "masters," "LP," A - 79, ¶3(a); "co-publishing," "musical compositions," "BMI," "ASCAP," "publisher's share," "performance fees," "public performances," "writer's share," and "performing rights society," A - 84 - 85, ¶¶1, 4.

In late 2005, Appellant and Respondents entered into music industry contracts with two third parties. On September 26, 2005, Respondent Four Kings and Island Def Jam Music Group ("Def Jam") entered into an agreement (the "Def Jam Agreement") under which Respondent agreed to furnish Appellant's exclusive services as a recording artist to Def Jam. A - 94. Appellant simultaneously entered into a so-called "Side Letter" agreement with Def Jam in which she consented to be bound by all of the terms of the Def Jam Agreement, and further agreed that Def Jam could contract with her directly should Respondent no longer be entitled to her services under the parties' Recording Agreement. A - 104 - 106. On November 15, 2005, the parties signed a co-publishing and exclusive administration agreement with EMI ("EMI Agreement"). A - 148.

Finally, in early 2006, the parties separately entered into several music industry contracts with SESAC. On January 4, 2006, Appellant signed the following three agreements with SESAC: Writer Affiliation Agreement ("SESAC Writer Agreement"), A 306; SESAC Supplemental Agreement, A – 349; and Publisher Affiliation Agreement ("Appellant Publisher Agreement"), A – 470. The Supplemental Agreement amended the SESAC Writer Agreement. A – 349. On the same day, Respondents separately entered into a Publisher Affiliation Agreement ("Respondent Publisher Agreement") with SESAC. A - 311

Like the music industry agreements between the parties, undefined music industry terms are located throughout the parties' agreements with Def Jam, EMI, and SESAC. *See* Def Jam Agreement, A – 95, ¶3(a) ("Master Recordings," "works made for hire"), A – 98, ¶5(a) ("LP"), A – 99, ¶6 ("mechanical royalties"); EMI Agreement, A – 158, ¶7.02 (c) ("songwriter's share," "public performance income," "performing rights society"), A – 164, ¶10.02(a) ("publisher's share"); SESAC Writer Agreement, A – 306, ¶5(a) ("writer's share"), Appellant's SESAC Publisher Agreement, A – 470, ¶5(a) ("publisher's share"), and Respondents' SESAC Publisher Agreement, A – 311, ¶5(a) (same).

C. The Breaches.

Immediately upon the execution of the EMI Agreement in November 15, 2005, EMI paid a $250,000.00 advance to Appellant and Respondents. A – 162. Mr. Middleton, Respondents' transactional lawyer at the time, took $50,000.00 "off the top" from this advance. *Id.* and A – 191. Respondents admit to commissioning fifty-percent (50%) of the remaining $200,000.00. A - 244, ¶99.

In or about January 4, 2006, SESAC paid Appellant an "initial advance" of $125,000.00 pursuant to the SESAC Supplemental Agreement. A - 316, ¶1(A). According to the agreement, this advance is to be "fully recouped by SESAC from monies received by SESAC and otherwise payable to Writer pursuant to paragraph 5 of the Affiliation Agreement," which is the SESAC Writer Agreement. A - 316, ¶4. Paragraph 5 of the SESAC Writer Agreement, which is entitled "Royalties," provides that SESAC "shall make payments to Writer in an amount equal to Writer's share of the monies allocated by SESAC [.]" A - 307, ¶5(a). The Respondents admit to commissioning fifty-percent (50%) of this advance. A - 244, ¶104. However, Appellant's check from Respondents indicates they took more than fifty-percent (50%). A - 352 (see check #1130).

Soon thereafter, the parties' counsel exchanged a barrage of letters. On June 1, 2006, Appellant's former lawyer, Theo Sedlmayr, Esq., sent Mr. Middleton a demand letter seeking payment of Appellant's share of the EMI and SESAC advances ("Sedlmayr Correspondence"). A - 318. On June 30, 2006, Mr. Middleton sent a letter ("Middleton Correspondence") in response to the Sedlmayr Correspondence, stating: "assuming, *arguendo*, that...the SESAC advance...was an advance against her writer's share," then the Management Agreement would entitle

"Four Kings to twenty (20%)" of the SESAC advance. A - 321. The Middleton Correspondence demanded that Appellant pay expenses totaling $103,882.00. *Id.* The expenses are set forth in several documents. A - 326 - 332

Finally, in or about January 1, 2007, Respondents took fifty-percent (50%) of a $100,000.00 EMI advance. A - 99. There is evidence they took more than fifty-percent (50%) of this advance. A - 352 (see check #1130). Respondents also continued to commission fifty-percent (50%) of Appellant's $3,000.00 living advance from Def Jam. A - 59, ¶20.

In light of the foregoing, Appellant terminated the parties' agreements on June 26, 2007. A - 190. On the same day, she sent notices of such termination to Def Jam, A - 194, and EMI, A - 199. Appellant filed and served a Summons and Complaint on July 11, 2007 ("Complaint"). A - 54.

V. Argument.

A. Scope of review.

Under CPLR §5501, this Court has the power to review all questions of law and fact decided by the Court below, and is "vested with the same discretionary power and may exercise that power, even when there has been no abuse of discretion as a matter of law" by the lower Court. *Hazelhurst v. Brita*, 744 N.Y.S.2d 31, 33 (1st Dep't 2002). Where, as here, "the findings made by the trial court are based" wholly "upon considerations other than the credibility of witnesses, this court need not accord its findings great deference." *Orbit Holding Corp. v. Anthony Hotel Corp.*, 503 N.Y.S.2d 780, 783 (1^{st} Dep't 1986).

B. The April Order erroneously dismissed Appellant's claims.

1. The contract claims.

a. The Court erred when it refused to familiarize itself with the meanings of the undefined technical terms that the parties use in their agreements.

Before the Court could properly interpret the parties' agreements, the Court had a duty educate and familiarize itself with the meaning of the undefined, material, technical music industry terms used in the agreements. *See Fox Film Corporation v. Jack W. Springer*, 273 N.Y. 434 (N.Y. 1937), *Harber Philadelphia Center City Office Limited v. Tokai Bank*, 721 N.Y.S.2d 519 (1^{st} Dep't 2001).[1] Objective extrinsic evidence provides this familiarity. *Fox Film*, 273 N.Y. at 437 and *Harber,* 721 N.Y.S.2d at 519. Such familiarity is required because "[t]he best evidence of what parties to a written agreement intend is what they say in their writing." *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002).

In *Fox Film*, Fox, the plaintiff, was a film distributor who sued Springer, the defendant, who operated a chain of theatres. 273 N.Y. at 434. The parties entered into an

[1] *See also HNC Realty Company v. Bay View Towers Apartments, Inc.*, 409 N.Y.S.2d 774, 780 (2d Dep't 1978) and *Rose Stone Concrete, Inc. v. County of Broome*, 429 N.Y.S.2d 295, 296 (3d Dep't 1980).

agreement where the defendants promised to "display fifty-eight films released by the plaintiff for distribution and to pay for each picture a fixed license fee." *Id.* at 434 - 435. The contract also provided: "On six pictures allocated by Fox, Fox is to received [sic] 50% overage after the theatre had received as 50% profit what Fox receives as film rental." *Id.* at 435. Plaintiff Fox brought suit to recover money Springer solely owed for two pictures that were "'allocated' by" Fox per the clause above. *Id.* After a trial, the lower court dismissed Fox's complaint because the "contract requires 'accountings upon six pictures as one group,'" and so Fox could not recover on an a la carte basis for Springer's "failure to pay 'overage' on separate pictures." *Id.* The Appellate Division affirmed. *Id.* at 437.

However, the Court of Appeals reversed because the:

> controversy between the parties is upon the narrow question of whether 'overage' is to be calculated upon all six pictures as a group so that the amount due can be determined only by an accounting, upon which losses sustained in the display of one picture might be offset against profits derived from another, or whether the plaintiff is entitled to a share of the profits derived from the display of each picture as soon as display of the picture is completed.

Id. at 435. Throughout the parties' contract "words and phrases are used which may be understood by those engaged in the business or art of motion picture production, distribution, and exhibition, but which convey no meaning to those who are not initiated into the mysteries of the craft." *Id.* at 427.

As a result, the Court of Appeals was "without a guide in arriving at the construction of the words where there is disagreement between parties as to the meaning they were intended to convey." *Id.* Consequently, "while the parties may if they choose use their own special dictionaries, [] *when they ask the uninitiated to construe their contracts they must furnish them with the dictionaries they have used.*" (Emphasis added.)

The parties "have not done so in this case," the Court of Appeals noted. *Id.* at 436. This was problematic because the parties had different interpretations of the "overage" clause and how it should have been applied. *See id.* The Court of Appeals went on to explain that "the parties have used language understood, we must assume, by those cognizant of the special or technical meaning of words used in the profession or art of the parties," but that "[i]n that language" the Court of Appeals was "illiterate." *Id.* at 437. To do become literate, a court "must be informed of the meaning of the language as generally understood in that business, in the light of the customs and practices of the business. *It must be made literate in a language which it is now unschooled.*" *Id.* (emphasis added).

Like the contract in *Fox Film*, the parties' relevant agreements contain numerous undefined technical terms. *See infra*, §IV(B). Consequently, Appellant provided the Court below with objective extrinsic evidence that would have familiarized the Court with these undefined terms. This evidence showed that "musical recording" refers to "the physical embodiment of a particular performance of the musical composition, which is usually in the form of a 'master recording,'" whereas "musical composition" refers to the written "lyrics and the music (or melody) and is the work created by the composer and lyricist." A - 380 - 381.

As a matter of music industry custom and practice, "fifty percent of the income generated from the exploitation of the musical composition is payable to the writer(s) of the musical composition, *irrespective of who owns the copyright in such musical composition."* A - 385 (emphasis added). This interest is referred to as the "writer's share." *Id.* But "the remaining fifty percent is allocable to the publisher" or co-publishers, according to their "percentage interest in the copyright" to the compositions. *Id.* This pecuniary interest is referred to as the "publisher's share." *Id.* The existence of the distinction between writer's share and publisher's share is well noted in federal case law.[2]

Accordingly, under the parties' Co-Publishing Agreement, the Appellant and Respondents "each own an interest in the copyright" to Appellant's compositions as co-publishers. A -

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[2] *See, e.g., Cusano v. Horpiro Entertainment Group*, 301 F.Supp.2d 272, n. 1 (S.D.N.Y. 2004) (citing *Nimmer on Copyright* § 30.02(A) (2001)) and *Jasper v. Bovina Music, Inc.*, 314 F.3d 42, 44 - 45, n.1 (2d Cir. 2002).

393, A - 385, and A - 392. Appellant did not transfer her writer's share to Respondents under their Co-Publishing Agreement. A - 84 - 87, *passim*. Therefore, Appellant, as the writer, "would still be entitled to receive all of the writer's share, but only one-half of the publisher's share (i.e., a total of 75% of the publishing income generated from the exploitation of the musical composition)." A - 385. Take a dollar that Appellant and Respondent Four Kings receive in mechanical royalties. As we saw, Mr. Dylan would receive such royalties for the licensing of his song "All Along The Watch Tower" to U2. Likewise, the parties would receive such royalties from their licensing of Appellant's song, which is called "I AM," to a record company or another artist, say Mr. Dylan, who seeks to reproduce the song on compact disc or via another medium, The Copyright Act sets this royalty rate. *See* 17 U.S.C. §115. Under the Co-Publishing Agreement, Respondent Four Kings retains 25 cents of each dollar of mechanical royalty, which represents 50% of the publisher's share of income. A - 84, ¶4; *see also* A - 385. Appellant receives 75 cents, 50 cents of which represents 100% of her writer's share of income and 25 cents of which represents 50% of the publisher's share of income. *See id.*

Had the parties intended to equally split mechanical royalties, other composition royalties, and advances against these royalties, they would have titled their agreement an "exclusive songwriter agreement." In such an agreement, the writer and publisher are *not* co-publishers because the publisher owns the entire copyright. A - 384 and A - 385. Normally, the writer owns the entire copyright to his or her compositions as their creator under the Copyright Act. *Id.*, §201(a). But under an exclusive songwriter agreement, the writer foregoes any such ownership because the writer "renders services exclusively for the publisher on a 'work for hire' basis" for the term of the agreement. *See* A - 385 and Copyright Act, §201(b) (original author of work is not owner when work is done as "work for hire"). Therefore, the publisher and writer equally split each dollar of publishing income, or advances against such income, under such an agreement, 50 cents for the publisher's share and 50 cents for the writer's share. *See* A - 391 and A - 386.

In this case, the parties entered into a co-publishing agreement and titled their document accordingly. *See* A - 84. While *Greenfield* required the Court to consider the meaning of "co-publishing" to effectuate the parties' intent, 98 N.Y.2d at 569, the Court nonetheless disregarded the meaning and significance of this word:

> Plaintiff's assertion that the contracts involve 'special or technical' music industry terms, which require expert clarification, is unavailing. *Although plaintiff discusses several technical terms used in the agreements, none of those terms are pertinent to the issues at hand*. The source and amount of funds are not disputed, only the percentage of those funds to which FKP is entitled. The Court

> does not need any technical expertise to ascertain the percentages specified in a contract, or to determine whether expenses were authorized.

A - 10 - 11 (emphasis added). The Court came to this erroneous holding because it chose to employ *Greenfield's* four corners analysis. *See* A - 11. The analysis provides:

> when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible *to add to or vary the writing*.

W.W.W. Associates, Inc. v. Giancontieri, 565 N.Y.S.2d 440, 443 (N.Y. 1990) (emphasis added); *Greenfield*, *supra*, 750 N.Y.S.2d at 569 (citing *Giacontieri*, *supra*, at 443)).

The Court here should not have used the four corners doctrine to understand the parties' agreements. *Greenfield* dealt with a contract dispute between a singing group, professionally known as "The Ronettes," and their record producer, Mr. Phil Spector, owner of Phillies Records, Inc. ("Phillies"). *Id.* at 566. The parties' dispute was over whether The Ronettes' undisputed and unlimited transfer of their ownership rights in their master recordings to Mr. Specter via a sales agreement in 1963 nonetheless limited him from redistributing those recordings in mediums not yet in existence in 1963. *Id.* at 567 - 568. The Court of Appeal held it did not. *Id.* at 566.

In *Greenfield*, Court of Appeals rightfully used the four corners doctrine. The Ronettes' sales agreement granted unlimited ownership rights in their masters to Phillies, as can be seen from the following provision of the agreement:

> All recordings made hereunder and all records and reproductions made therefrom together with the performances embodied therein, shall be entirely [Philles'] property, free of any claims whatsoever by you or any person deriving any rights of interest from you. Without limitation of the foregoing, [Phillies] shall have the right to make phonograph records, tape recordings or other reproductions of the performances embodied in such recordings *by any method now or hereafter known*, and to sell and deal in the same under any trade mark or trade names or labels designated by us, or we may at our election refrain therefrom.

Greenfield, 98 N.Y.2d at 568 - 570. The Ronettes conceded that this provision "unambiguously" gave Phillie's "unconditional ownership rights in the master recordings." *Id.* at 569. Nonetheless, they argued that the agreement did "not bestow the right to exploit those recordings in new markets or mediums since the document is silent on those topics." *Id.*

However, unlike The Ronette's "unfettered" transfer of their ownership rights in their masters to Mr. Specter, Appellant's transfer of her pecuniary and proprietary rights in her masters and compositions to Respondents was limited. Under ¶3(a) of the Recording Agreement, Respondents only had the right to withhold fifty-percent (50%) of "net advances," even though the agreement defines "advance" as "all monies paid to" Appellant. A - 79. "Net advances" is defined to include only those monies "actually received" by Four Kings from a "[d]istributor authorized to distribute recordings embodying the Masters[.]" *Id.* While these terms limit the definition of "net advance," the Recording Agreement does not define them. *See* A - 78 - 83, *passim.*

Likewise, Appellant transferred "an undivided fifty (50%) percent interest" in her copyright to the musical compositions to Respondents under their Co-Publishing Agreement. A - 84, ¶84. But Appellant is still entitled to seventy-five percent (75%) of net income in the case of mechanical license income under the agreement. A - 85, ¶4(b). In the case of public performance income, Appellant is entitled to fifty-percent (50%) of the "*[p]ublisher's share.*" *Id.*, ¶4(a) (emphasis added). This is in addition to her "'writer's share' of public performance income," which she is entitled to receive "*directly* from the applicable performing rights society." A - 85, ¶4 (emphasis added). The foregoing terms limit the parties' rights to composition royalties, and advances against such royalties, but the Co-Publishing Agreement doesn't define any of them. A - 84 - 87, *passim.* Hence, the parties' contracts in this case are limited by undefined technical terms, and so their contracts are unlike the unlimited sale in *Greenfield*.

In light of the foregoing, the Court's refusal to familiarize itself with the undefined terms in the parties' agreements was an error of law.

b. As a result of the Court's error, it dismissed Appellant's First and Second claims alleging breaches of the Management Agreement.

First, the Court failed to consider the EMI Agreement, Def Jam Agreement, and the parties' agreements with SESAC. The Court states:

> For the purpose of deciding the instant motion, only *certain provisions* of four contracts - the Exclusive Artist Management Agreement, the Exclusive Recording Agreement, the Co-Publishing Agreement, and a Merchandising Agreement - are pertinent.

A - 7. One or both of the parties are privy to, and are bound by, the agreements with Def Jam, EMI, SESAC. *See* A - 94; A - 148; A – 306; A – 316; A – 470; and A - 311. The advances from Def Jam, EMI, and SESAC were awarded pursuant to the Def Jam Agreement, EMI Agreement, and the Supplemental Agreement, respectively. *See* A - 94, ¶3(a); A - 148, ¶7.02; and A - 316, ¶1, respectively. Hence, the Court had a duty to consider these agreements in order to determine whether EMI or SESAC were "authorized to distribute recordings embodying the Masters" under ¶3(a) of the parties' Recording Agreement. A – 79. In failing to make this determination, the Court committed a reversible error.[3]

[3] Alternatively, the Court erred in implicitly finding that EMI and SESAC were "distributors" of "recordings embodying the Masters," which is a mixed question of law and fact subject to review. *See Hazelhurst v. Bria Products Co.*, 744 N.Y.S. 2d 31, 33 (1st Dep't 2002).

Second, the Court erred by considering "certain provisions" of the agreements in a vacuum:

> Simply stated, the two issues pertaining to the breach of contract causes of action are: one, whether, according to the terms of the agreements, FKP is entitled to 20% or 50% of the advances earned by plaintiff; and two, whether the expenses claimed by FKP for reimbursement were authorized.

A - 9. The Court's legal conclusion that "FKP is entitled to 20% or 50% of the advances earned by plaintiff" is inaccurate. Contrary to the Court, "the agreements between the parties" do not "specify that FKP is entitled to 50% of all 'advances' paid to plaintiff, separate and distinct from the compensation to be paid to FKP for its management services." A - 10. The parties' Recording Agreement explicitly limits Respondents' right to fifty-percent (50%) of "net advances," not to 50% "[a]ll monies" paid to Appellant. A – 79, ¶3(a). Consequently, the Court's reading of the agreement impermissibly divorces "net advance" from "advance." *See Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002).

Because the Court read the first sentence of the Recording Agreement's advance paragraph in a vacuum, the Court inappropriately applied the whole paragraph to the SESAC advance. This Court can take judicial notice of the fact that SESAC is a performing rights society.[4] Under their agreements

[4] *See, e.g., NYC Medical and Neurodiagnostic, P.C. v. Republic Western Insurance Co.*, 798 N.Y.S.2d 309, 314 (N.Y. Sup. App. Term 2004).

with Appellant, SESAC acts as Appellant's performing rights society and is authorized to license Appellant's right, both as a writer and co-publisher, to publicly perform her musical compositions to third parties. *See* A - 306, ¶2(a) (writer) and A - 470, ¶2(a) (publisher). While SESAC is also Respondent's performing rights society, SESAC is only authorized to license Respondents right, as Appellant's co-publisher, to publicly perform the compositions to third parties. A – 311, ¶2(a) (publisher). That's why Respondents only signed a publisher affiliation agreement. *See id.* In return for obtaining these rights, third parties pay public performance royalties, which SESAC separately collects on behalf of Appellant and Respondents. *See* A - 306, ¶2(e); A - 470, ¶2(e); and A - 311, ¶2(e). In no event is SESAC authorized to distribute recordings embodying Appellant's masters.

To clarify SESAC's role, assume Mr. Dylan enters into a co-publishing agreement with Respondent Four Kings that is similar to the one that they entered into with Appellant. In that case, Mr. Dylan and Four Kings are co-publishers of the Mr. Dylan's song, "All Along The Watchtower." When Mr. Dylan enters into a writer and publisher affiliation agreement with SESAC, the organization will be authorized to collect Mr. Dylan's writer's share of public performance royalties, in addition to his publishing share of such royalties. When Respondent Four Kings enters into a publisher affiliation agreement with SESAC, however, the organization will only have the power to collect Four Kings publisher's share of these royalties. Out of each dollar of public performance royalties collected by SESAC, the organization will deduct its applicable administrative fee and will remit the rest to Mr. Dylan and Respondent Four Kings. Out of this amount, Mr. Dylan will be entitled to seventy-five percent (75%), which represents his writer's share plus half of the publisher's share, whereas Respondent Four Kings will only be entitled to twenty-five percent (25%), which represents its half of the publisher's share. In either case, SESAC is not authorized to distribute the master of "All Along The Watch Tower."

Third, the Court erred by not applying the Management Agreement to the SESAC advance. As can be seen from the preceding discussion, the Recording Agreement was inapplicable to the SESAC advance. The Co-Publishing Agreement wasn't applicable to the SESAC advance, either. The agreement explicitly provides that Appellant "shall receive" her "'writer's share' of public performance income *directly from* the applicable performing rights society." A - 85, ¶4 (emphasis added). As a result, Appellant retained a 100% interest in such income, which is standard industry practice. *See* A - 385 and A - 392. Therefore, Respondents had no financial interest to these monies under the Co-Publishing Agreement. Instead, Respondents would have been entitled to at most twenty-percent

(20%) of the SESAC advance under the parties' Management Agreement. Mr. Middelton admits as much in the Middleton Correspondence when he says that the Management Agreement would entitle Respondent Four Kings to twenty-percent (20%) of the SESAC advance "assuming, *arguendo*" that the SESAC advance was against Appellant's "writer's share." *See infra*, Section IV(C). Under the Management Agreement, these "advances against royalties" are included within gross income. A - 73, ¶11(b)(1).[5]

Notwithstanding the foregoing, the Court utilized the Recording Agreement's 50% "net advance" provision to determine the parties' rights to the SESAC advance. In the Court's view,

> Pursuant to the "Exclusive Recording Agreement," the "Co-Publishing Agreement," and the "Merchandise Agreement," plaintiff transferred one-half of all of her copyrights to FKP. Therefore, the controlling contract for these funds is not the "Exclusive Artist Management Agreement," but the agreements indicated above, *pursuant to which terms FKP is entitled to 50% of plaintiffs earnings*, as 50% owner of her copyrights. *These funds are not derived from FKP's management services, but rather, from plaintiff's copyrighted works.*

A - 10 (emphasis added).

But as a matter of federal copyright law, Appellant did not transfer "one half of *all her copyrights* to" Respondents.

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[5] At the very least, the Court should not have dismissed of Appellant's first claim because Respondents actually took more than 50% of the SESAC advance. A - 352 (check #1030). According to that exhibit, Defendant Ellison paid only $107,600.00 to Appellant for both the $125,000.00 SESAC advance and the $100,000.00 EMI advance. *Id.* Even according to the Court's April Decision, Respondents Ellison should have paid 50% of both advances to Appellant, which is $112,500.00.

Under the parties' Recording Agreement, Appellant transferred *all* of her copyright to the masters to Respondents "as works made for hire." A - 79, ¶2(d); *see also* Copyright Act, §201(b). Only under the parties' Co-Publishing Agreement did Appellant transfer half of her copyright interest to Respondents, and then only for her musical compositions. A - 84, ¶1. As a result, "copyrighted works" cannot be pigeonholed together.

Moreover, the parties' percentage ownership of copyright is not equivalent to their financial interest in the monies derived from the copyrighted works in question. Under the Recording Agreement, while Respondents own 100% of the copyright to the masters, Appellant is still entitled to fifty percent (50%) of "net royalties" generated by the masters. A - 80, ¶4. Under the parties' Co-Publishing Agreement, while Respondents own 50% of the copyright to the musical compositions, Appellant is entitled to seventy-five percent (75%) of "net income" derived from the public performance and mechanical licensing of such compositions. A - 85, ¶4(a), (b); *see also infra*, §V(B)(1)(a).

Finally, it was an error for the Court to apply the Recording Agreement, and not the parties' Management Agreement, to the Def Jam living advances. Unlike the other advances awarded by Def Jam, these advances were not awarded pursuant to the Def Jam Agreement. *See* A - 94 - 147, *passim*.

Consequently, Def Jam did not award these living advances in "connection with the production, promotion, or exploitation of the Masters" as a matter of law under ¶3(a) Recording Agreement, even though Def Jam is undoubtedly a "Distributor." A - 79. Thus, only the Management Agreement's 20% "gross earnings" provision would have applied to these advances.

For these reasons, this Court should reverse the Court's dismissal of Appellant's first and second claims.

c. As a further result of the Court's error, the Court dismissed Appellant's ninth and tenth claims alleging breaches of the Recording Agreement.

First, the Court did not assume as true Appellant's factual allegation that Respondents retained 50% of the advances, not "royalties," that Respondents "received" on behalf of Appellant from EMI. Compare A - 12 ("royalties") with A - 60 - 61, ¶¶26 - 27 ("advances"). While advances are recouped from royalties, *see* A - 383, advances are not royalties.

Second, the Court "misconstrued the plain language of the" EMI agreement by finding that the agreement is a "recording contract." A - 12. Such a contract grants the contracting record company rights in musical recordings or masters. A - 387. The EMI Agreement, as a co-publishing and administration agreement, only gives EMI rights to Appellant's musical compositions. *See* A - 148, ¶A ("Compositions"); A - 151, ¶1.15

(the "Recording Agreement" is the Def Jam Agreement); A - 145, ¶5 (defining "Compositions").

The Court's error is material. The "net advance" provision of the parties' Recording Agreement could not have applied to the EMI advances. All of these advances were awarded to the parties under ¶9 of the EMI Agreement. A - 162 - 164. EMI recoups these advances from future mechanical and public performance royalties generated by the compositions otherwise payable to the parties. *Id.* at ¶9.01. Consequently, the Court erred in applying the Recording Agreement to the EMI advances because EMI is not authorized to distribute Appellant's masters.

Rather, only the Co-Publishing Agreement can be used to ascertain the parties' rights to the EMI advances. Paragraph four of Co-Publishing Agreement determines the parties' rights to mechanical and public performance royalties. A - 85, ¶4(a) - (b). EMI recoups the parties' advances from the parties' share of these royalties. *See* A - 164, ¶10.02 (a) - (b). Just as with the advances under the Def Jam Agreement, the parties' rights to the EMI advances will track their respective financial interests in the royalties that EMI will use to recoup the advances. The advances paid pursuant to the Def Jam Agreement are recoupable from royalties generated by the sale or licensing of the masters which would otherwise be payable to the parties. A - 117 at ¶6.01 and A - 119 at ¶7. Accordingly, the parties' equal right to the Def Jam recording advances under their Recording Agreement tracks their equal financial obligation to Def Jam in recouping the advances. The same logic applies to the EMI composition advances.

Third, the Court erred in law by finding that Section 4 of the Recording Agreement "also specifically includes plaintiff's 'writer's share' of performances as part of her total royalties." A - 12. This language is not found anywhere in the Recording Agreement. *See* A - 78 - 83, *passim*. The parties only use "writer's share," and its equivalent, "songwriter's share," in their Co-Publishing Agreement. A - 85, ¶4. Paragraph 4 lists the parties' respective financial percentages in the royalties generated by the compositions, and then provides that "[s]uch royalties are inclusive of" Appellant's "songwriter royalties." *Id.* As is standard in the music industry, the parties split the publisher's share of royalties under paragraph 4 because they are co-publishers, but Appellant still retained the right to her writer's or songwriter' share of income. A - 385 and A - 392. For example, paragraph 4 gives Appellant the right to seventy-five percent (75%) of mechanical licensing income. A - 85, ¶4(b). This represents half of the publisher's share of such income (25%), and all of Appellants' songwriter's share of income, which is fifty-percent (50%) of the total. *See infra*, §V(B)(1)(a). That's why the paragraph explicitly carves out Appellant's right to "receive [her] 'writer's share' of public performance income directly from the applicable performing rights society." A - 85, ¶4.

Fourth, the Court errs in equating (1) the parties' interest in the copyright to the compositions under the EMI Agreement with (2) their financial interest in the royalties generated by the compositions under the EMI Agreement. The Court states:

> According to the EMI contract, of the 100% of the money EMI made, it retained 50% and remitted 25% to plaintiff and 25% to FKP. These funds represented monies derived from EMI's exploitation of plaintiff's *copyrighted works*.

A - 12 (emphasis added). The Court continues: "Therefore, from the 100% that was remitted collectively to plaintiff and FKP (50% of the total earned by EMI), each kept one-half, which was their contract right." *Id.*

While the EMI Agreement changed the parties' ownership interests in the copyright to the compositions, this only affected the parties' rights to the publisher share of income derived from the compositions, just as under their Co-Publishing Agreement, *see infra*, §V(B)(1)(a). Under the EMI Agreement, Appellant and Respondents each transferred half (50%) of their ownership in the copyright to the musical compositions to EMI, their fellow co-publisher. A - 148, ¶7.01. This left EMI with a fifty-percent (50%) interest in the copyright, whereas the parties were each left with a twenty-five percent (25%) ownership interest in the copyright. *Id.* Consequently, EMI was left with a fifty-percent 50% interest in the publisher's share of income (which is 25% of the total mechanical or public performance licensing income). *See* A - 148, ¶10.02(a). The parties were each left with 25% shares in publisher's share of income (which is collectively 25% of the total mechanical or public performance licensing income). *See id.*

Notwithstanding, Appellant still retained a 100% interest in her "writer's share" of composition royalties, which is 50% of total mechanical and public performance income, under the EMI Agreement, just as with parties' Co-Publishing Agreement, *see infra*, §V(B)(1)(a). Under the EMI Agreement, the writer's share (a/k/a/ "songwriter's share") of public performance income is paid directly to Appellant by her "performing rights society." A - 158, ¶7.02(c); *see also id.* at ¶¶ 7.02(d), A - 164 at 10.02(a), and A - 165 at 10.03.[6] For example, ¶10.02(a) provides that EMI will credit the parties' "Royalty Account" with "seventy-five percent (75%) of Net Income from" public performance income, provided that "2/3 of such seventy-five percent (75%)," which is fifty-percent (50%), "shall be deemed the 'writer's share' of public performance income[.]" A - 164.

[6] EMI has the right to administer such income under certain circumstances. *See id.* at ¶¶7.07(b)(A), 8.02, and 8.03.

This means the following. For every dollar of public performance income under the EMI Agreement, EMI retains 25 cents (which represents half of the publisher's share of income). A - 385. Respondents would be entitled to 12.5 cents (which represents twenty-five percent (25%) of the publisher's share). *Id.* Appellant would be entitled to 62.5 cents (12.5 cents of which represents her remaining twenty-five percent (25%) interest in the publisher's share), and the remaining 50 cents would represent her writer's share in public performance income). *Id.*

Fifth, the Court erred when it found that "[p]laintiff's assertions are based on the percentage designated by EMI, which only concerns the numerical distribution of its earnings according to its agreement with FKP, and does not reflect the contract between FKP and plaintiff." A - 12. But the EMI Agreement specifically incorporates the "numerical distributions of earnings" between the parties under their Co-Publishing Agreement as the "Underlying Agreement," A - 148, to determine the parties' "interests" to royalties under the EMI Agreement. A - 155, ¶5.05(a) (defining "Your Interest") and A - 164, ¶10.2 (royalty rates depending on "Your Interest"). Therefore, the parties' respective rights to royalties under the EMI Agreement is relevant to determining their rights to the EMI advances.

Sixth, the Court erred in law by holding that Respondents were entitled to fifty-five percent (50%) of the EMI advances under the Co-Publishing Agreement. EMI will not pay any mechanical and public performance royalties to the parties until the advances are recouped. A - 148, ¶¶9.01, 9.02(ii), 10.1(a), 10.1(b), and 10.2. The Co-Publishing Agreement gives Appellant the right to seventy-five percent (75%), and Respondents the right to twenty-five percent (25%), of "net" public performance and mechanical licensing royalties. A - 85, ¶4(a) and (b). Therefore, the Co-Publishing Agreement entitled Appellant to seventy-five percent (75%) of the EMI advances against mechanical and public performance licensing royalties, and Respondents to twenty-five percent (25%) of such advances.

However, the April Order held that Appellant only has a right to fifty-percent (50%) of the EMI advances even though EMI is recouping 75% of these advances out of Appellant's share of mechanical and public performance royalties, but only 25% out of Respondents' share of such royalties. The Court's holding would still be wrong even assuming, for the purpose of argument, that EMI only recouped the parties' advances from "synchronization royalties" or "other income" under the EMI Agreement. A - 164 - 165, at ¶¶10(c), (d). Synchronization royalties result from "when a musical work is used in a movie, commercial or television show." *Jasper v. Bovina Music, Inc.*, 314 F.3d 42, 44 - 45, n.1 (2d Cir. 2002). "Other income" under the EMI Agreement is any income other than mechanical licensing, public performance, and synchronization royalties. A - 165, ¶10 (d).

In either case, Respondents are not entitled to fifty-percent (50%) of the EMI advances. In the case of advances against synchronization royalties, Respondents would only be entitled to at most thirty-five percent (35%). Under the parties' Co-Publishing Agreement, Respondents are only entitled to thirty-five percent (35%) of the synchronization royalties from which these advances are recouped, leaving Appellant with a sixty-five percent (65%) interest. *See* A - 85, ¶4(h). In the case of advances against "other income," Respondents would only be entitled to thirty-percent (30%). The Co-Publishing Agreement only entitles Respondents to thirty-percent (30%) of the "other income" from which these advances are recouped, leaving Appellant with a seventy-percent (70%) interest. *Id.* at ¶4(c) and (f). In either case, the only question would be the amount of Appellant's damage, not the existence of it.

Finally, the Recording Agreement is facially or latently ambiguous. A contract is ambiguous when it is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who...is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Sayers v. Rochester Telephone*, 7 F.3d 1091, 1095 (2d Cir. 1993). Latent ambiguity exists when a contract appears on its face to only have one meaning, but in fact has more than one. *See Lazar v. Nico Industries, Inc.*, 559 N.Y.S.2d 326, 327 (1st Dep't 1990); *AM International v. Graphic Management Associates*, 44 F.3d 572, 575 - 576 (7th Cir. 1995). When read together, "advances" and "net advances" render the Recording Agreement ambiguous. The Recording Agreement defines "advances" as "all monies paid" to Appellant. A – 79, ¶4(a). And yet the agreement only gives the parties' the right to evenly split "net advances," which are monies actually received from a "Distributor" who is "authorized" to "distribute recordings embodying the Masters." *Id.* At the same time, the agreement then expands "net advance" to mean "payments in connection with the exploitation of rights hereunder and *otherwise*[.]" *Id.*

Two contradictory conclusions follow from this language. One conclusion is that "or otherwise" suggests that the parties intended this provision to be applied to advances in connection with recordings and compositions, in addition to merchandising, which are factually separate product markets. *See* A - 380 - 381. The other conclusion is that "net advances" suggests that the parties only intended for this provision to be applied advances in connection with Appellant's masters, which is precisely why the parties signed three different agreements, each with their own definition of "Net" revenue and split of "royalties." *See* A – 79, ¶3(a) and A – 80, ¶4(a); A - 85, ¶4;

and A - 90, ¶4. Had the parties wanted the Recording Agreement to apply to all advances, regardless of their source, they easily could have signed one agreement with an advance provision that explicitly governed all three product markets in one fell swoop. They didn't.

Nonetheless, the Court found that Appellant's proffer of extrinsic evidence was meant to "create" ambiguities that didn't exist in the Recording Agreement. A – 11. Appellant respectfully submits she submitted the evidence to assist the Court with its interpretation of these highly technical agreements, or at least to show the Court the latent or hidden ambiguities. While the Recording Agreement on its face may have appeared to only have one meaning, another meaning existed to one "cognizant of the customs, practices, usages and terminology as generally understood in the" music business. *Sayers*, *supra*, 7 F.3d at 1095. This does not mean that becoming cognizant of the ambiguity creates the ambiguity. Assume Mr. Dylan sees the top 1/4 of an iceberg above water on Monday. He thinks that is the whole iceberg. On Wednesday, this Court shows Mr. Dylan the bottom 3/4 of the iceberg that was submerged under water. Mr. Dylan now knows he didn't see the whole iceberg on Monday. But this does not mean that the iceberg has been created for him on Wednesday. It just means that Mr. Dylan was unaware of the size of the iceberg on Monday. Likewise, the Court was merely unaware of the ambiguity in the Recording Agreement because the Court was unfamiliar with the meaning and importance of its undefined technical terms. *See Lazar*, 559 N.Y.S.2d at 327 and *AM International,* 44 F.3d at 575 - 576.

For these reasons, the Recording Agreement's ambiguous wording should have precluded dismissal.

d. Appellant's eleventh claim is not duplicative of her third claim.

The Court erred in law when it dismissed Appellant's eleventh claim for non-bona fide expenses under the Recording Agreement as redundant with her third cause of action for unauthorized expenses under the Management Agreement, which the Court sustained. A - 13.[7]

To the extent that any of the expenditures under the Recording Agreement were made "in connection with the production, promotion, or exploitation of the Masters," they would need to be "bona fide" under the Recording Agreement, without regard to whether they were approved under the Management Agreement. A - 61, ¶28; *see also* A – 79. The Court should not have disposed of Appellants' claim at the motion to dismiss stage because a "material question[] of fact" existed as to whether these expenses were "bona fide." A – 11.

[7] The Court dismissed Respondents' counterclaim for $21,329.48 in expenses from 2004 that they allegedly incurred under a 2003 oral management agreement with Appellant. A - 215 - 216

Therefore, the Court erred in law by dismissing Appellant's eleventh cause of action.

2. The non-breach of contract claims.

a. The Court erred when it dismissed Appellant's fraudulent inducement and negligent misrepresentation claims.

i. Fraudulent inducement.

First, the Court found that Appellant was attempting to "convert" her "cause of action for breach of contract into fraud." A - 13. That's because the Court improperly construed Appellants' Complaint as alleging a "mere assertion that" Respondent Ellison "did not intend to meet" his "contractual obligations." A - 13. Appellant alleged more than a "mere assertion."

Instead, Appellant alleges that Respondent Ellison made a promise "to take care" of her best interests as her fiduciary all the while he had "a preconceived and undisclosed intention of not" living up to his promise. In reliance upon Respondent Ellison's representation, Appellant provided her "signature," A - 341, to the parties agreements in January 2005. *See* Section IV(B), *infra*. However, a principal-agent relationship existed between the parties before January of 2005. Respondent Ellison started managing Appellant pursuant to an oral management agreement in 2003, A - 257, ¶183, and he started assisting Appellant with her career, an acting as Appellant's informal agent, as early as 2001. *See* A - 57, ¶13. As a consequence, Respondent Ellison had fiduciary duties to Appellant as early as 2001, regardless of the existence of an oral or written management agreement between them. *See EBC Inc. v. Goldman, Sachs, & Co.*, 5 N.Y.3d 11, 19 (2005), *Meese v. Miller*, 436 N.Y.S.2d 496, 499 (N.Y. App. Div. 1981), and A - 209. The existence and scope of Respondent Ellison's fiduciary duty is a material issue of fact that should not have been disposed of by the Court on a motion to dismiss. *See Apple Records, Inc. v. Capitol Records, Inc.*, 529 N.Y.S.2d 279, 283 (1st Dep't 1998). For these reasons, Respondent Ellison's statement is an actionable. *See Deerfield v. Chesebrough*, 68 N.Y.2d 954, 956 (N.Y. 1986).

Second, the Court improperly found that Appellant's "allegations of fraud are conclusory and lack sufficient particularity to satisfy the requirements of CPLR 3016(b)." A - 13. Under CPLR 3016(b), a fraud pleading must state the "circumstances constituting the wrong in detail," and must "provide sufficient detail to inform defendants of the substance" of the claims. *Kaufman v. Cohen*, 307 A.D.2d 113, 120 - 121 (1st Dep't 2003). But because fraud is rarely susceptible to direct proof, it most often be inferred from circumstantial evidence. *See, e.g., Litho v. Kohls*, 582 F. Supp. 1561, 1564 (S.D.N.Y. 1983).

Appellant's allegations, coupled with circumstantial evidence, "inform" the Respondents of the substance of her claims. The following takings violate Respondent Ellison's fiduciary duties even under the April Order. The Complaint alleges that immediately after Appellant signed with EMI in November 2005, Mr. Middleton, Respondent's attorney at the time, took of $50,000.00 "off the top" from the first advance from EMI for his legal fees. A - 190. Appellant obtained evidence showing that Respondents also took more than fifty-percent (50%) of the second EMI advance and the SESAC advance. A - 352 (see check #1030). She did not have the benefit of getting Respondent Ellison's explanation of such takings via deposition, A - 338, ¶21, which is Appellant's primary vehicle of establishing circumstantial or direct evidence of fraud. *Nonnon v. City of New York*, 842 N.Y.S.2d 756, 758 (N.Y. 2007). Nonetheless, Respondent Ellison's takings alone provide enough circumstantial evidence to create an issue of fact concerning his intent that should have foreclosed dismissal. *See Apple Records*, *supra*, 529 N.Y.S. at 283. That is precisely why fraud cases are best decided at the summary judgment with the benefit of such testimony. *See Deerfield*, *supra,* 68 N.Y.S.2d at 956.

For these reasons, it was an error for the Court to dismiss Appellant's fraudulent inducement claims.

ii. Negligent misrepresentation.

For similar reasons, the Court erred when it dismissed Appellant's seventeenth claim for negligent misrepresentation. In the Court's view, Respondent Ellison's alleged statements are merely "conclusory and/or constitute mere puffery, opinions of value or future expectations." A - 16.

Appellant respectfully submits that this is not accurate. Respondent Ellison was Appellant's fiduciary as soon as he started acting in a representative capacity for Appellant in 2001, which is a question of fact. *See infra,* §V(B)(2)(a)(i). Consequently, Respondent Ellison possessed, or indicated he possessed, unique or specialized experience," and was in "a special position of confidence and trust with" Appellant such that her reliance on any alleged negligent misrepresentation was "justified." *Murphy v. La Framboise Group*, 839 N.Y.S.2d 883, 885 (4th Dep't 2007) (citations omitted). At the motion to dismiss stage, the Court was obliged to accord Appellant "the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Nonnon*, *supra,* 842 N.Y.S.2d at 758.

The alleged facts here fit into at least on cognizable legal theory. Respondents' statement of "I'll take care of you" in 2001 was a representation of both his intent and capacity to properly effectuate his fiduciary responsibilities to Appellant. Even without Respondent Ellison's deposition and assuming that Respondents were entitled to fifty-percent (50%) of all advances, there is still strong circumstantial evidence that this statement was not factually true. *See infra*, §V(B)(2)(a)(i). This representation is substantively different than non-actionable puffery like "this car is great,"[8] and from a mere expression "of future expectation."[9] These statements cannot be proved false. However, Respondent Ellison's statement can. Either he had the intent and capacity to properly "take care" of Appellant as her fiduciary, or he did not.

Therefore, this Court should reverse the dismissal of Appellant's negligent misrepresentation claims.

b. The Court erred by finding that Appellants' unjust enrichment and conversion claims were barred because of the existence of a "valid contract."

i. Unjust enrichment.

The Court dismissed Appellant's sixth and thirteenth claims for unjust enrichment merely because "the existence of valid contract bars a cause of action in quantum merit." A - 14. The Court erred in so doing.

First, Respondent Ellison was Appellant's fiduciary irrespective of whether there was a binding oral or written agreement between the parties. *See infra,* §V(B)(2)(a)(i). Mr. Middleton's EMI advance taking, and Respondents' greater than 50% taking of the EMI and SESAC advances, shows that Respondents were unjustly enriched while acting as Appellant's fiduciaries. While courts have dismissed unjust enrichment

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8 *Elghanian v. Harvey*, 671 N.Y.S.2d 266 (1st Dep't 1998).

9 *Bango v. Naughton*, 584 N.Y.S.2d 942, 944 (3d Dep't 1992).

claims such as this when there is a valid contract, they have done so only in the absence of a fiduciary relationship. *Compare SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354 (1st Dep't 2004) (dismissal appropriate because no fiduciary relationship between debtor and note holder) *with Apple Records, Inc., supra*, 529 N.Y.S.2d at 283 (affirming denial of dismissal where fact issue concerning informal fiduciary relationship existed).

Second, Respondents were also unjustly enriched when they were paid half of the Def Jam LP2 advance to on June 27, 2008. A - 372.[10] Appellant terminated the parties' Recording Agreement on June 26, 2007. A - 190.[11] On the same day, Appellant provided notice to Def Jam that Respondents were no longer entitled to be the "grantor" of Appellant's services. A - 194. Therefore, Respondents had no right to any of the LP2 advance under the Def Jam Agreement.

For these reasons, this Court should reverse the dismissal of Appellant's unjust enrichment claims.

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[10] As Ms. Benson's letter indicates, Def Jam's payment of the $110,000.00 LP2 advance was an accommodation to the parties, which was permitted under ¶12.03 of the Def Jam Agreement. *See*, A - 135. The other alternative under ¶12.03 would have been for Def Jam to withhold these funds. *Id.* Appellant didn't know, and still doesn't know, when the litigation with Respondents will stop. So she opted to receive half of the LP2 advance without waiving her right to collect the other half from Respondents as additional damage.

[11] Alternatively, the Recording Agreement was rescinded in November 2005, even without any notice, due to Respondent Ellison's refusal to properly perform his obligations under the agreement. *See, e.g.*, *Jones v. Jones*, 648 N.Y.S.2d 585, 586 (1st Dep't 1996); *Manning v. Manning*, 470 N.Y.S.2d 744, 747 (3d Dep't 1983).

ii. Conversion.

For many of the same reasons, the Court erred in dismissing Appellant's eighth and fifteen claims for conversion. The Court dismissed Appellant's conversion claims because "they were predicated on a mere breach of contract claim with no independent facts to give rise to tort liability." A - 16. Additionally, dismissal was warranted, in the Court's view, because a claim for conversion "cannot be based solely on the allegation that a defendant received money and failed to remit payment to the plaintiff." *Id.*

In the same breath, the Court sustained Respondents' conversion counter claim against Appellant. A - 216. The same legal analysis applies to Appellant's conversion claim. Respondents owed Appellant a fiduciary duty. *See infra*, §V(B)(2)(a)(i). The monies that Respondents converted were "specifically identifiable." For example, the Def Jam LP2 advance was all placed into Respondent Four King's bank account, A - 373, and was for specific a sum -- $110,000.00 -- under the Def Jam Agreement. A - 372. The same is true of the other advances. Respondents were obliged as fiduciaries to "treat" such monies "in a particular manner" by remitting the appropriate percentages to Appellant under their agreements. A - 216.

For these reasons, this Court should reverse the dismissal of the eight and fifteenth claims.

c. The Court erred in dismissing Appellant's fourteenth claim for breach of fiduciary duty merely because the Recording Agreement didn't contain a provision creating such a duty.

The Court erred in law when it dismissed Appellant's fourteenth claim for breach of fiduciary duty. The Court dismissed this claim because "the Recording Agreement does not contain any provisions that create a relationship where defendants assumed a role of trust and confidence as advisor to plaintiff." A - 15. However, Respondent Ellison owed a fiduciary duty to Appellant because the parties established a principal-agent relationship as early as 2001 even if the Recording Agreement does not contain a provision creating such a duty. *See infra,* §V(B)(2)(a)(i). As Appellant's fiduciary pursuant to this relationship, Respondent Ellison was "bound to exercise the utmost good faith and undivided loyalty toward" her regardless of the contract involved. *Sokoloff v. Harriman Estate Development Corp.*, 96 N.Y.2d 409, 416 (2001).

Therefore, this Court should reverse the dismissal of Appellant's fourteenth claim.

C. The August Order erred in denying Appellant's motion to renew, reargue, and supplement.

1. The Court erred in finding that the affirmations did not present new facts, but merely legal conclusions.

First, in support of her motion, Appellant submitted testimony, along with exhibits, which offer "new or additional" facts and "information" that "clarified" certain factual issues. *See Garner v. Latimer*, 761 N.Y.S.2d 657, 658 (1st Dep't 2003); *Sheridan v. Very, LTD,* 867 N.Y.S.2d 88, 89 (1st Dep't 2008). This testimony consisted of the following: Expert Affirmation of Peter S. Shukat ("Shukat Affirm"), A - 419;[12] Affirmation of Bruce Scavuzzo ("Scavuzzo Affirm"), A - 438;[13] and Affidavit of Dennis Lord ("Lord Aff."), A - 447.[14] None of this testimony was previously submitted to the Court. *See* A - 405, ¶7.

This testimony clarifies, as a matter of fact, that: EMI is recouping the EMI advances "from the total royalties otherwise payable to plaintiff and defendant, including from plaintiff's writer's royalties (other than public performance income)," A - 444, ¶12; as a matter of industry custom and practice, after EMI deducts its twenty-five percent (25%) share of mechanical licensing royalties, it keeps the remaining

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12 Mr. Shukat is a veteran entertainment lawyer who is the principal of Shukat Arrow Hafer Weber & Herbsman, L.L.P.

13 Mr. Scavuzzo is the Senior Vice President of Business and Legal Affairs at EMI Entertainment World, Inc., of which EMI, is a subsidiary.

14 Mr. Lord is Executive Vice President of SESAC.

seventy-five percent (75%) to recoup the parties' EMI advances, *id.*, ¶11; as a matter of industry custom and practice, out of the parties' seventy-five percent (75%) share of mechanical licensing royalties, Appellant would be entitled to 62.5 cents (50 cents of which represents her writer's share, and 12.5 cents of which represents her 25% publisher's share), whereas Respondents would be entitled to 12.5 cents (which is their 25% publisher's share), once the EMI advances are recouped, *id.*; and the SESAC advance was against Appellant's writer's share in public performance royalties. *See* A - 449, ¶7.

Second, just because the affiants are attorneys doesn't ipso facto turn all of their testimony into "legal conclusions." The terms in the parties' agreements are undefined, and so the terms' meaning is an issue of fact. *NFL Enterprises LLC v. Comcast Cable*, 851 N.Y.S.2d 551, 557 (1st Dep't 2008); *see also* U.C.C. §1-205(2). As such, custom and usage testimony may be used "to clarify an issue calling for technical knowledge possessed by an expert and beyond that of" the Court. *See Garner, supra*, 761 N.Y.S.2d at 658 and *De Long v. County of Erie*, 469 N.Y.S.2d 611 (1983).

Here, the affiants provide custom and usage testimony concerning: "musical compositions" and "musical recordings," *see* A - 422, 425, A - 442, ¶8, A - 447, ¶2; the significance of the parties' use of the word "co-publishing" as the title of their agreement, A - 423; the meaning of the words "publisher's share" and "writer's share" in a co-publishing agreement, A – 423, A - 439, ¶4; the consequences of the parties' use of such standard terms in their Co-Publishing Agreement on the parties' rights to income from compositions, under standard music practice, A – 423, A – 439, ¶4. The affiants also provide much needed factual testimony concerning the amount and nature of royalties EMI and SESAC will pay the parties once their advances are recouped. A - 444, ¶11 - 12; A – 449, ¶¶6 – 7. Consequently, the affiants do not merely opine on the "ultimate question" being asked, *Thompson v. Keohane*, 516 U.S. 99, 111 - 112 (1995), which is whether Respondents' takings breached the parties' agreements.[15] Nonetheless, the Court below found that the affiants merely presented "legal conclusions." A - 22.

In so finding, the Court erred.

2. Even if the affirmations were available to Appellant, she provided reasonable justification for not providing them.

Appellant did not previously provide this testimony because it would not have been appropriate to do so. *See* A - 405, ¶7. The Respondents' motion to dismiss tested the legal sufficiency of Appellant's allegations, not the facts upon which those allegations were made. *See Noonon v. City of New York*, 842 N.Y.S.2d 756, 758 (N.Y. 2008). The Court did not

15 Even assuming, for the purpose of discussion, that some of the affiants' testimony consists of legal conclusions, the Court nonetheless abused its discretion in failing to consider the affiants' factual custom and use testimony.

convert Respondents' motion into one for summary judgment even though the Court had the power to do so. *See* CPLR §3211(c). Nonetheless, the Court expected that Appellant should have submitted this evidence as though it were a summary judgment motion. A - 22. However, it would have been inappropriate under Court of Appeals case law to offer this factual testimony as "evidentiary support for" Appellant's claims. *Noonan*, *supra*, at 758.

When Appellant's omission is viewed properly, she provides reasonable justification.

3. The Court failed to ensure "substantive fairness" when it refused to consider the affiants' factual testimony even though it warranted a change to the April Order.

The purpose of a motion to renew and reargue is to ensure "substantive fairness" and "justice." *Garner v. Latimer*, 761 N.Y.S.2d 657, 658 (1st Dep't 2003). While a motion for leave to renew is generally "based on new facts not offered on the prior motion that would...change the prior determination," CPLR §2221(e)(2), in the First Department, this requirement "is not inflexible[.]" *Garner, supra*, 761 N.Y.S.2d at 658. Accordingly, "the court, in its discretion, may also grant renewal, in the *interests of justice*, upon facts known to the movant at the time the original motion was made." *Id.* (emphasis added)

In light of the foregoing, the Court below had a duty to consider the affiants' factual testimony because it warrants a modification of the Court's April Order.[16] The April Order held that ¶3(a) of the Recording Agreement entitled Respondents to 50% of Appellant's SESAC and EMI advances. A - 12. But the factual testimony shows that the reference to "recording embodying the Masters" in that paragraph of the Recording Agreement does not refer to musical compositions, only recordings. *See* A - 422, 425, A - 442, ¶8, A - 447, ¶2. The testimony also shows that the EMI and SESAC advances were not against royalties from "recordings embodying" Appellant's "Masters." A - 444, ¶11 - 12; A - 449, ¶¶6 - 7.

Moreover, the April Order found that Respondents were entitled to "50% of Plaintiff's earnings, as a 50% owner of her copyrights" to the musical compositions. A - 10. The factual testimony shows, as a matter of music industry custom and practice, otherwise. A - 439, ¶4; *see also* A - 423 - 424. Contrary to the April Order, the undefined terms, such as "writer's share" and "publisher's share," in the parties' Co-Publishing Agreement are "pertinent to" determining the parties' rights to advances from EMI and SESAC.

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[16] This evidence also warrants a change in the April Order even if it implicitly found as a factual matter that SESAC and EMI are "authorized to distribute recordings embodying" Appellant's "Masters" under the Recording Agreement.

Finally, with respect to the non-breach of contract claims, the factual testimony presents strong circumstantial evidence of Respondent Ellison's bad faith. His takings, *see infra*, V(B)(2)(a)(i), egregiously flouted industry customs and standards. A - 426 - 434. This evidence warrants a modification of April Order in so far as it found Respondent Ellison's "I'll take care of you" statement to Appellant non-actionable puffery. By refusing to address or consider the merits of Appellant's evidence, the Court placed procedural form over "substantive fairness" and "justice." *Garner, supra*, 761 N.Y.S.2d at 658.

For these reasons, the Court erred.

4. The Court erred when it failed to grant Appellant's motion to amend.

The Court erred when it failed to grant Appellant's motion to amend or supplement her Complaint per CPLR §3025.[17] Such motions should be "freely granted." CPLR §3025. It is an "improvident exercise of discretion to deny such leave absent an inordinate delay and a showing of prejudice," *Noanjo v. L & M Kids Fashion, Inc.*, 615 N.Y.S.2d 747, 748 (2d Dep't 1994), both of which are lacking here.

Appellants' supplements or amendments have merit. For example, Appellant sought to supplement her complaint with the

[17] "CPLR 3025(b) governs both the amendment and supplement of a pleading" which "downplays the significance between the two." David D. Siegl, New York Practice, §237 (4^{th} ed. 2005).

damage she suffered as a result of Respondents' more than fifty-percent (50%) taking of the SESAC and second EMI advance. A - 352. These takings are actionable even under Court's April Order.

VI. Conclusion.

For the foregoing reasons, Appellant respectfully submits that this Court reverse either or both the April Order and August Order.

Dated: New York, New York
February 5, 2010

Respectfully submitted,

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PRINTING SPECIFICATION STATEMENT

Pursuant to Appellate Division Rule 22 NYCRR Section 600.10(d)(1)(v), I hereby certify that the foregoing brief was prepared on a computer (a word processor). A monospaced typeface was used, as follows:

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

- -

CHRISETTE MICHELE PAYNE,

Plaintiff,

Index No. 07-602283

v.

DOUGLAS ELLISON and FOUR KINGS PRODUCTIONS, INC.

Defendants

- -

PRE-ARGUMENT STATEMENT

Plaintiff Chrisette Michele Payne submits this pre-argument statement per §600.17(b) of the Rules of the Supreme Court, Appellate Division, First Department:

1. The title of the action is *Chrisette Michele Payne v. Douglas Ellison and Four Kings Productions, Inc.*, Index No. 07-602283.

2. The full name of the Plaintiff is Chrisette Michele Payne. The full names of the Defendants are Douglas Ellison and Four Kings Productions, Inc.

3. The name, address, and telephone number of counsel for appellant and petitioner is as follows, respectively: Ryan E. Long, Esq., Ryan E. Long PLLC, 419 Lafayette Street, New York, New York 10003-7033, with the following telephone number: (212) 360 – 0394.

4. The name, address. and telephone numbers of counsel for the respondent are as follows: Jon D. Jekielek, Esq., Meyerowitz Jekielek, PLLC, 347 Fifth Avenue -- Suite

1300, New York, New York 10016, Telephone: (212) 686 – 7008, and Dwane Smith, Esq., Dwane Smith PLLC, 236 West 26th Street, Suite 303, New York, New York 10001, Telephone: (212) 736 – 2624 (Ext. 15).

5. The court and county, or administrative body from which the appeal is taken: Supreme Court of the State of New York, New York County.

6. Nature and object of the cause of action or special proceeding (e.g., contract-personal services, sale of goods; tort — personal injury, automobile accident, malpractice, equity — specific performance, injunction, etc.): this is a breach of contract action concerning personal services, in addition to a tort action for fraudulent inducement, negligent misrepresentation, conversion, unjust enrichment, and breach of fiduciary duty.

7. Result reached in the court or administrative body below: the Supreme Court of the State of New York, via an Decision and Order dated April 5, 2009, dismissed all of Plaintiff's breach of contract claims, save one, and all of her non-breach of contract claims, save one. Two of the seventeen original claims were originally withdrawn.

8. Grounds for seeking reversal, annulment, or modification: the Decision and Order erred in its recitation of law and fact. At this time, there is no additional appeal in this case, and no related case.

Dated: New York, New York
May 8, 2009

Respectfully submitted,

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